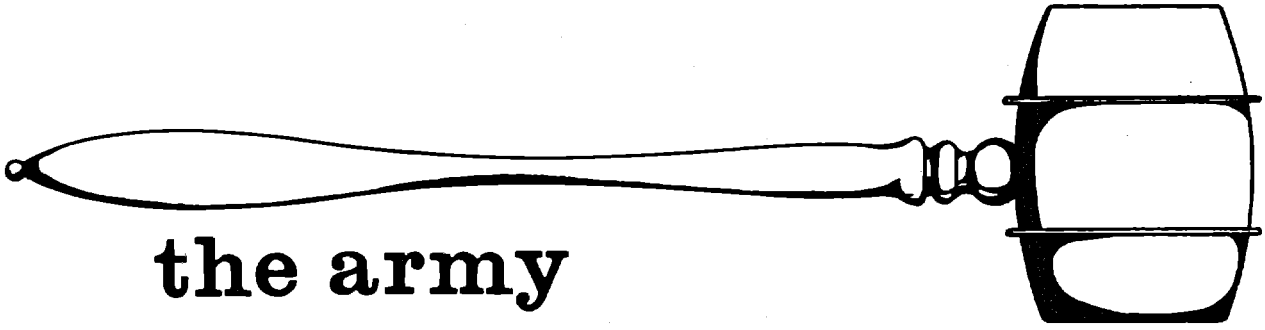

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Article 31 and the Involuntary Seizure of Body Fluids. An Inquiry Into the Vitality of United States v. Ruiz.[1]

LTC Herbert Green
Chief, Criminal Law Division
The Judge Advocate General's School

One of the most severe problems besetting the Army in the last decade has been the widespread use of illegal drugs.[2] To combat this affliction, the Army and its major commands have adopted comprehensive administrative and medical programs.[3] As part of these programs, soldiers have been required to submit urine specimens for analysis. One such soldier was Private Robert Ruiz.

Pursuant to a U.S. Army Vietnam anti-drug campaign, Ruiz and other members of his company furnished urine samples for analysis. When Ruiz's sample proved positive he was sent to a detoxification center. Subsequently, he returned to his unit and two weeks later was ordered to provide another

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[1] 48 C.M.R. 797 (C.M.A. 1974)

[2] *See generally* Schlesinger v. Councilman, 420 U.S. 738 (1975); Committee for G.I. Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975); United States v. Trottier, 9 M.J. 337 (C.M.A. 1980).

[3] *See, e.g.*, Army Regulation No. 600-85, Alcohol and Drug Prevention and Control Program (1 May 1976).

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C. 20310

REPLY TO
ATTENTION OF:

DAJA-ZX

MAY 7 1981

SUBJECT: Establishment of Army National Guard JAGC Liaison Positions

ALL MEMBERS OF THE JUDGE ADVOCATE GENERAL'S CORPS

1. I am pleased to advise you of the establishment of two new Army National Guard judge advocate positions. Brigadier General Paul N. Cotro-Manes has been named as the Army National Guard Special Assistant to The Judge Advocate General, and Major Louis R. (Buddy) Hardin has been appointed as the Army National Guard Liaison Officer to The Judge Advocate General's School. Further information on Brigadier General Cotro-Manes and Major Hardin may be found in the Reserve Affairs section of this issue.

2. All of us are well aware of the critical role of our Reserve Components, both Army Reserve and Army National Guard, and the need to insure that they meet the highest standards of training and professional competence. The establishment of these positions marks a major milestone in that they will significantly facilitate the meeting of those requirements by the Army National Guard which possesses the bulk of the combat forces of the Reserve Components.

3. Brigadier General Cotro-Manes, assisted by Major Hardin, will be primarily responsible for technical supervision of judge advocate activities in the Army National Guard. I anticipate that their primary attention, at least in the near future, will be directed at doctrine, training, recruitment, retention, mobilization, and federalization.

4. The establishment of these positions is another step forward in the Total Army concept, but a concept is only as good as the support it is given. Therefore I expect all Staff Judge Advocates to support these officers and to insure maximum liaison/cooperation between active, Reserve, and Army National Guard judge advocates.

ALTON H. HARVEY
Major General, USA
The Judge Advocate General

urine sample for follow-up analysis. He refused to obey the order, was subsequently convicted of willful disobedience, and eventually appealed to the Court of Military Appeals. In that court, he argued that furnishing the urine sample would have required him to incriminate himself and that under Article 31 of the Uniform Code of Military Justice[4] he had the right to refuse to obey an order which would have such a consequence. The government responded by arguing that the results of the urinalysis would not be used in a court-martial and that the contemplated use in an administrative elimination proceeding was beyond the protection afforded by Article 31.

The initial and most important decision for the Court of Military Appeals was the determination of the scope of the protection afforded by Article 31. Did it extend beyond testimonial evidence to include the furnishing of body fluids or was it limited to the scope of the fifth amendment self-incrimination clause?[5] This question was apparently easy for the court to resolve. It relied on its earlier cases[6] and reaffirmed that the protection af-

[4] **Art. 31. Compulsory self-incrimination prohibited**

(a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

[5] No person . . . shall be compelled in any criminal case to be a witness against himself . . . . U.S. Const. amend. V.

[6] *See, e.g.*, United States v. White, 38 C.M.R. 9 (C.M.A. 1967) (handwriting exemplars); United States v. Minnifield, 26 C.M.R. 153 (C.M.A. 1958) (handwriting exemplars); United States v. Musguire, 25 C.M.R. 329 (C.M.A. 1958 (blood alcohol test); United States v. Jordan, 22 C.M.R. 242 (C.M.A. 1957) (urine specimen); United States v. Rosato, 11 C.M.R. 143 (C.M.A. 1953) (handwriting exemplars).

The Judge Advocate General
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Issues may be cited as *The Army Lawyer*, [date], at [page number].

forded by Article 31 is greater than that provided in the Constitution. Thus, unlike the fifth amendment self-incrimination clause, Article 31 protects against the involuntary furnishing of handwriting exemplars, blood samples and urine specimens. Accordingly, the court held that when, as in this case, the accused knows that obedience to an order would result in the furnishing of incriminating evidence he has the statutory right to refuse to comply.

In addition to determining the type of evidence protected by Article 31, the court also held that the codal protection extends to administrative elimination proceedings. The command intended to utilize any positive test results in an elimination proceeding which might result in the awarding of a general discharge. Such a discharge, the court opined, could have "a serious effect on the accused's future,"[7] and therefore the accused realistically feared that he would incriminate himself and properly invoked his Article 31 privilege.

In subsequent cases, the Army Court of Military Review citing *Ruiz,* held that disobedience of an order to provide a urine specimen[8] and disobedience of an order to go to the dispensary for a urine test[9] ran afoul of Article 31 and reversed convictions for these offenses. *Ruiz* was not limited to urine samples or to seizure of body fluids. In *United States v. Hay,*[10] the Army Court of Military Review cited *Ruiz* as authority for reversing a conviction for willful disobedience of an order to empty one's pockets where the refusal was based on the knowledge that to do so would provide incriminating evidence.

To invoke the protection of *Ruiz* and Article 31, the fear of self-incrimination must have been the reason for the disobedience and must be communicated to the individual giving the order. In *United States v. Smith,*[11] the accused refused an order to perform physical training. On appeal from his conviction for willful disobedience of the order, he argued that had he complied with the order his commander would have known he was feigning an injury and therefore he would incriminate himself. The court agreed that *Ruiz* would protect the accused in this situation, and would permit him to invoke his privilege against self-incrimination and disobey the order. However, the accused did not inform the commander of the basis of his refusal. Since the accused "did not assert any right to refuse compliance with an order that had all the indicia of legality, he cannot belatedly claim that his failure to comply was prompted by his belief that compliance would tend to incriminate him."[12]

The importance of the *Ruiz* decision was its extremely broad interpretation of the protection against self-incrimination afforded by Article 31. Under the Article 31 umbrella were placed the providing of handwriting exemplars, body fluids, and acts such as the performance of physical training which are not intended to be testimonial or of a communicative nature. Recently, the Court of Military Appeals has restricted the scope of Article 31. Accordingly, these cases must be examined to determine whether *Ruiz* and its progeny are still viable and accurate statements of law.

In *United States v. Armstrong,*[13] the accused was suspected of driving while under the influence of alcohol. He was advised of his right to refuse to submit to a blood alcohol test but was also informed that if he refused to submit to the test his USAREUR driver's license would be revoked and he would be sent to a German medical facility where a

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[7] United States v. Ruiz, 48 C.M.R. 797, 799 n.2 (C.M.A. 1974).

[8] United States v. Jackson, 1 M.J. 606 (A.C.M.R. 1975).

[9] United States v. Peterson, 49 C.M.R. 696 (A.C.M.R. 1974).

[10] 3 M.J. 654 (A.C.M.R. 1977)

[11] 4 M.J. 210 (C.M.A. 1978)

[12] 4 M.J. at 214.

[13] 9 M.J. 374 (C.M.A. 1980).

blood alcohol sample would be obtained by force if necessary. The accused then agreed to submit to the blood alcohol test. At his trial and again on appeal, the accused claimed that he had not been given the proper Article 31(b) warnings prior to giving the blood sample and that by giving the sample he had been compelled to incriminate himself in violation of Article 31(a).

In its opinion, the Court of Military Appeals recognized that the constitutional privilege against self-incrimination and the military's statutory privilege had been interpreted in significantly different ways. The protection afforded by the Constitution extends only to evidence of a testimonial or communicative nature[14] and not to the extraction of body fluids or the giving of handwriting exemplars. The military privilege had been interpreted as providing greater protection than its constitutional counterpart. Accordingly, the initial task for the court was to determine whether there was a sound reason for the dual interpretation and whether the dichotomy should continue. The court found that there was a valid reason for the warning requirement which was triggered by suspicion.[15] Subtle pressures exist in military society and to offset these pressures the warning requirement was adopted. Thus, the court found a sound basis and congressional intent for the warning requirement which at the time of its adoption was not mandated by the Constitution. With respect to the other question, whether the Article 31(a) protection extended beyond evidence of a testimonial or communicative nature, the court could not find any congressional intent for such protection. Indeed, the court found that "the clearly manifested intent of Congress in enacting Article 31(a) was merely to afford to service persons a privilege against self-incrimination which paralleled the constitutional privilege."[16] Since the involuntary submission to blood alcohol tests was not within the testimonial or communicative protection of the fifth amendment self-incrimination clause, it was similarly beyond the protection afforded by Article 31(a). Accordingly, the court held that the test results were properly admitted in evidence against the accused.[17]

Any doubts about the new and restricted interpretation of the protection afforded by Article 31 were completely dispelled in *United States v. Lloyd.*[18] In that case, the issue was "whether an Article 31(b) warning must precede a request that a suspect provide a handwriting exemplar."[19] The court responded by declaring that

> like blood specimens . . . handwriting and voice exemplars are not protected by the privilege against self-incrimination . . . . Under the rationale of our recent decision in *United States v. Armstrong* . . . there is no reason to require an Article 31(b) warning before requesting a suspect to give a handwriting sample, or . . . to pro-

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[14] "The distinction which has emerged, often expressed in different ways, is that that privilege is a bar against compelling 'communications' or 'testimony' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." Schmerber v. California, 384 U.S. 757, 764 (1966).

[15] The warning required by Article 31(b) must be given to an individual when the individual is suspected of an offense. This is in marked contrast to the warning requirement of Miranda v. Arizona, 384 U.S. 436 (1966), which need not be given unless the suspect is in custody "or otherwise deprived of his freedom of action in any significant way", 384 U.S. at 444. Although the trigger for military warning is suspicion and not custody, the military warning need not be given unless the questioner is acting in an official capacity and the person questioned perceived that the inquiry involved more than a casual conversation. United States v. Duga, 10 M.J. 206 (C.M.A. 1981).

[16] United States v. Armstrong, 9 M.J. 374, 383 (C.M.A. 1980).

[17] Since the furnishing of the blood sample was beyond the self-incrimination protection of Article 31(a), no Article 31(b) warning was required.

[18] 10 M.J. 172 (C.M.A. 1981).

[19] 10 M.J. at 174.

duce a document containing his signature or handwriting to be used for comparison purposes.[20]

The Military Rules of Evidence contain a similarly restricted interpretation of the protection afforded by Article 31. Rule 301 provides that Article 31 is applicable "only to evidence of a testimonial or communicative nature."[21] The drafter's analysis makes clear that the Supreme Court's interpretation restricting the privilege to evidence of a testimonial or communicative nature was preferred to the much broader pre *Armstrong* view of the Court of Military Appeals.[22] In addition, Rule 312 creates a procedure for obtaining body fluids.[23] The rule is consistent with the Supreme Court's interpretation that obtaining body fluids is essentially a fourth amendment seizure question and not a fifth amendment self-incrimination issue.[24]

In *Ruiz,* the court held that the Article 31 protection against self-incrimination extended to and could be invoked in administrative elimination proceedings. This holding was not founded on the expanded protections afforded by Article 31 *vis a vis* the fifth amendment, but upon a reading of the Supreme Court cases interpreting the fifth amendment. To the extent that *Ruiz* is an accurate reflection of the nature of the proceeding in which the fifth amendment protection applies, it has some vitality. However, this does not mean that the privilege against self-incrimination can be invoked in administrative elimination proceedings to prevent admission of test results of body fluids. It merely offers the accused the right to invoke the privilege in those proceedings with respect to evidence of a testimonial or communicative nature.

What then of an order to give a urine sample? The answer requires that three other questions be decided. Is such an order violative of the privilege against self-incrimination? *Armstrong* and *Lloyd* compel a negative response and uphold such an order. Second, may the urinalysis results be utilized in an administrative proceeding? The privilege against self-incrimination applies to such proceedings, but only to evidence of a communicative or testimonial nature. Since urinalysis results are not of such a nature, their consideration would not be prohibited by Article 31.[25] Third, is the order lawful? If

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[20] 10 M.J. at 175.

[21] Mil. R. Evid. 301.

[22] *See* App. 18, Rule 301, Manual for Courts-Martial, 1969 (Rev. Ed.).

[23] Mil. R. Evid. 312. For an excellent discussion of this Rule *see* Schlueter. *Bodily Evidence and Rule 312 M.R.E.,* The Army Lawyer, May 1980, at 35.

[24] *See* Schmerber v. California, 384 U.S. 757 (1966).

[25] One of the matters which disturbed the court in *Ruiz* was the potential use of the urinalysis results in an administrative proceeding which could lead to a general discharge. This result would not permit the accused to be separated "from the service without penalty." Accordingly, the court found that the fear of these consequences meant the accused had a legitimate apprehension of self-incrimination. Apparently, the court equated these consequences with a conviction by court-martial. In *Committee for G.I. Rights v. Callaway,* 518 F.2d 466 (D.C. Cir. 1975), the court upheld a USAREUR anti-drug campaign which required some drug abusers to participate in a urinalysis program. The results were admissible in an elimination proceeding which could lead to a general discharge. However, the court distinguished *Ruiz* as a case unrelated to the inspection provisions of the program but did not discuss the effect of *Ruiz* on the issuance of a general discharge. More recently, in *Giles v. Secretary of the Army,* 627 F.2d 554 (D.C. Cir. 1980), the court ruled that *Ruiz* mandated that soldiers given general discharges as a result of urinalysis conducted in violation of Article 31, were entitled to have their discharges upgraded to honorable discharges. It should be noted that *Giles* appears to have adopted the *Ruiz* interpretation of Article 31 and has not created a new rule of law. Therefore, *Giles* should not apply to these proceedings held after the effective date of *United States v. Armstrong,* 9 M.J. 374 (C.M.A. 1980).

Army Regulation 600-85, Chapter 3, Section VI (1 May 1976), authorizes a mandatory program of random urinalysis. If positive urinalysis results from this program are utilized in an administrative elimination proceeding no discharge other than honorable

the order relates to a military purpose, it is lawful. Since the debilitating effect of illicit drug use upon the military can be established[26] and has been recognized by the Court of Military Appeals,[27] it should not be too difficult to establish that an order to give a urine sample which is part of a comprehensive anti-drug abuse campaign is lawful.

It is clear from the strong and forthright language in *Armstrong* and *Lloyd* that the scope of the self-incrimination protection of Article 31 is now identical to the protection afforded by the fifth amendment. It extends to all evidence of a testimonial or communicative nature but no farther. It does not extend to the extraction of body fluids or the submission of handwriting exemplars. What then is the effect on *Ruiz* and its progeny? To the extent that those cases hold that an individual may properly refuse an order to furnish a body fluid on grounds of self-incrimination, they have been overruled *sub silentio*. The basis of *Ruiz* and its progeny was the expanded protections afforded by Article 31. Since the court has held that this expanded protection no longer exists, the statutory basis for *Ruiz* is similarly affected. Accordingly, it appears that to the extent *Ruiz* represents the scope of the privilege against self-in-crim-i-na-tion as afforded by Article 31, it is no longer a viable precedent.

may be awarded. Army Reg. No. 635-200, Change 3 (1 May 1980). This provision is required by *Ruiz* but in light of *Armstrong* it is no longer required by Article 31. However, notwithstanding the minimum protection afforded by Article 31 the Army is at liberty to grant greater protection to an individual than is required by the Constitution or by statute. *Cf. United States v. Jordan*, 44 C.M.R. 44 (C.M.A. 1971). It apppars that the Army has done so in this situation. Therefore, until the regulation is amended its provisions must be utilized.

[26] *See, e.g.*, Schlesinger v. Councilman, 420 U.S. 738 (1975); Committee for G.I. Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975).

[27] *See* United States v. Trottier, 9 M.J. 337 (C.M.A. 1980).

"Oaths are but Words, and Words but Wind."

Samuel Butler, Hudibras, pt. II [1664], canto II, 1.107.

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It would be an understatement to suggest that fourth amendment practice is a difficult aspect of law. One reason for this is found by way of analogy to the predicament Mickey Mouse finds himself in as the sorcerer's apprentice in the movie Fantasia. Having discovered the ease by which he can cause brooms to bring buckets of water to the wizard's workshop, Mickey attempts to curtail his assistants efforts by chopping them up with an ax. Much to his dismay the brooms multiply in number, the array continuing to deliver water.

Decisions dealing with fourth amendment questions are much the same. Issues seemingly resolved in one case invariably sire a host of new questions for litigation. The holdings of the United States Court of Military Appeals in *United States v. Fimmano*,[2] which

[1] U.S. Const. Amend. IV, prescribes:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[2] 8 M.J. 197 (C.M.A. 1980), pet. for reconsideration not granted, 9 M.J. 256 (C.M.A. 1980).

applies the "oath or affirmation"[3] requirement to military search authorizations, and the subsequent retrenchment in *United States v. Stuckey,*[4] are representatives of this quandry. The *Fimmano* decision prompted various acknowledgement procedures from the services.[5] These decisions and regulations will not represent the final word on the subject. On one hand, government counsel and law enforcement investigators dealing with newly generated methodologies probably will follow them without deeper reflection. It will be their belief that the regulatory standards implemented represent a constitutionally and judicially sound procedure having been carefully thought out at the highest levels of authority before being instituted. On the other hand, military defense counsel will, as the loyal opposition, challenge every aspect of procedure in order to assure their client's rights are accorded the full measure of constitutional protection.

The purpose of this comment is to explore the *Fimmano*[6] and *Stuckey*[7] decisions and the potential issues they may generate. It is the thesis of this evaluation that the means by which the Army has responded to the military application of the affirmation requirement is constitutionally sufficient. Additionally, that administration of an oath is a minor burden with limited opportunity for litigation.

The Authorities

United States v. *Fimmano,* 9 M.J. 256 (C.M.A. 1980)

A company commander was provided information, *not* under oath or affirmation, which lead him to believe that drugs would be found in the accused's room. Based upon the tip, the commander had two subordinates conduct a search of the room. The searchers located and seized various items of drug paraphernalia and narcotics. At trial, the defense moved to suppress items of evidence on the ground that the authorization was issued without probable cause. The motion was denied.[8] The Army Court of Military Review affirmed the trial court's evidentiary holding. The Court of Military Appeals found that the information provided by the informant, which was the

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[3] In part the definition of "oath" includes:

> An affirmation of truth of a statement, which renders one willfully asserting untrue statements punishable for perjury. An outward pledge by the person taking it that his attestation or promise is made under an immediate sense of responsibility to God. A solemn appeal to the Supreme Being in attestation of the truth of some statement. An external pledge or asseveration, made in verification of statements made, or to be made, coupled with an appeal to a sacred or venerated object, in evidence of the serious and reverent state of mind of the party, or with an invocation to a supreme being to witness the words of the party, and to visit him with punishment if they be false. In its broadest sense, the term is used to include all forms of attestation by which a party signifies that he is bound in conscience to perform the act faithfully and truly. In a more restricted sense, it excludes all those forms of attestation or promise which are not accompanied by an impreciation.

BLACK'S LAW DICTIONARY 966 (5th ed. 1979).

[4] 10 M.J. 347 (C.M.A. 1981).

[5] *See, e.g.,* Army Reg. No. 27-10, Legal Services Military Justice, Chap. 5 (15 Aug. 1980) [hereinafter cited as AR 27-10] and United States Coast Guard Commandant Instruction M 5810.1, section 605.

[6] 8 M.J. 197 (C.M.A. 1980).

[7] 10 M.J. 347 (C.M.A. 1981).

[8] *Id.* at 202. Interestingly enough, defense counsel never precisely raised the question resolved by the Court at the trial level. This presented no impediment to resolution of the issue. It was explained at note 9 on page 200:

> The appellant's contention that the search authorization in this case was issued without probable cause or written application is sufficiently broad to invoke our consideration of the validity of this Court's prior holdings with respect to the requirement that the finding of probable cause be based upon oath or affirmation. Moreover, during the oral arguments before us, counsel for the parties fully argued the question of whether this provision of the Fourth Amendment is binding. Accordingly, we hold that the question is properly before this Court for consideration.

basis of the authorization, "was a bare unsworn assertion for which he took no moral or legal responsibility and was, therefore, not sufficient."[9] The court did not set aside the findings and sentence, but mandated that the constitutional requirement of the oath would apply to searches conducted after the publication date of the opinion.[10] Thereafter, government counsel petitioned the court for reconsideration. The motion was denied.[11]

The Regulatory Response

In answer to the *Fimmano* mandate, the Army filled the void by establishing procedures to be followed in oath administration.[12] It should be underscored that the regulatory prescriptions merely stated the manner in which the oath was to be administered, and did not provide the requirement for the oath itself. Three major elements constituted the new process.[13]

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[9] *Id.*

[10] The date was set as June 21, 1980, as the Court had never imposed the requirement previously in its decisions. In order to prevent judicial chaos, the rule had prospective application only. *Id.*

[11] 9 M.J. 256 (C.M.A. 1980). The decision was predicted on an equally divided Court, Chief Judge Everett not participating. Nevertheless, the Chief Judge did comment on the persuasiveness of the case. In his perception, the original *Fimmano* decision has no precedential value due to the lack of consensus between the judges who decided it. Actually, Chief Judge Fletcher and Judge Perry agreed on the need for the oath. Realistically, Chief Judge Everett's position on reconsideration may well leave that decision with precedential value. As a metter of practical politics, most attorneys evaluated the result as a binding legal interpretation. Thus, the services permitted their regulations in response to the decision to remain intact.

[12] The authority to designate individuals authorized to administer oaths was derived from Article 136(a), UCMJ, 10 U.S.C. § 936(a), which provides:

"(a) The following persons on active duty may administer oaths for the purposes of military administration, including military justice . . . (7) All other persons designated by regulations of the armed forces . . . "This, of course, clearly addresses itself to the problem of *who* may be designated to impose the affirmation. *See also* United States v. Stuckey, 10 M.J. 347, 362, 22, 24 (C.M.A. 1981). Not as clear is the legal predicate supporting the implementation of a *procedure* which is created. Article 36(a), UCMJ, 10 U.S.C. §836(a), permites the President to establish "[p]retrial, trial, and post-trial procedures" for the court-martial itself, but does the oath to support a search authauthorization come within the orbit of this statute? Additionally, may the President cloak himself or his subordinates with the authority to set forth swearing procedures? *See* Mil. R. Evid. 315(f)(2) which prescribes that "[t]he Secretary of Defense or the Secretary concerned may prescribe additional requirements" for the probable cause determination. The Analysis of the 1980 Amendments to the Manual for Courts-Martial indicates this provision would be the legal vehicle for establishing affirmation procedures. Article 42, 10 U.S.C. § 842 generally deals with oaths but this appears to be of limited value as its parochial concern is with the respective duties of court-martial personnel, to wit: the military judge, counsel, members, reporters and interpreters. Perhaps the answer is found in the idea that the authority to designate those who may swear individuals implicitly allows the establishment of the manner to be followed as well. In a different vein, it may be that the authority to promulgate the procedure is within the inherent power of the Secretary of the Army. 10 U.S.C. § 3012 provides, in part:

(b) The Secretary is responsible for and has the authority necessary to conduct all affairs of the Department of the Army, including—

(1) functions necessary or appropriate for the training, operations, *administration*, logistical support and maintenance, welfare, preparedness, and effectiveness of the Army, including research and development; (emphasis supplied) . . .[and]

(g) The Secretary may prescribe regulations to carry out his functions, powers, and duties under this title.

[13] Paragraphs 5–9 and 5–10, AR 27–10 set forth the procedure. They provide the following guidelines:

5–9. Oath administration procedures— persons providing information in support of requests for authauthorizations to search and seize and authorizations to apprehend. Commanders, and all other military personnel empowered to authorize searches and seizures, upon probable cause, ordinarily will perform the function of administering the required oaths to persons presenting information to them in support of such authorizations and authorizations to apprehend. The information presented may be oral or in writing. Where written information is provided by message or written statement, other persons authorized to administer such oaths may do so, and the authorizing official may accept representations by the persons providing the information that this has been done. The representations should

(1) The class of individuals authorized to administer oaths was expanded. Included in such were "[c]ommanders, and all other military personnel empowered to authorize searches and seizures."[14]

(2) The oath could be provided in written or oral format.

(3) The affirmation could be in any form. It did not have to encompass specific language.

United States v. *Stuckey,* 110 M.J. 347 (C.M.A. 1981)

A number of cases concerned with the oath requirement remained pending after the *Fimmano* decision. Summary action to dispose of them was not taken. Using *Stuckey* as a vehicle to express his view regarding the need for sworn information supporting the probable cause evaluation, Chief Judge Everett sharply steered away form the positions previously taken by his colleagues.[15] His legal position[16] incorporated two important concepts:

(1) The command authorization process is outside the contemplation of the fourth amendment, thus obviating the necessity to adhere to the "oath or affirmation" requirement.[17]

(2) The command authorization process is measured by the fourth amendment concept of "reasonableness," thus, as a measure of this standard, it is valid to assess whether an oath covered information submitted to support a probable cause finding.[18]

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provide the name and authority of the person administering the oath, and the date and place of administration. If the information presented to the authorizing official consists solely of previously sworn affidavits, the individual requesting the authorization need not be sworn. However, if the requestor or any other individual personally provides any information to the authorizing offocial for use in the probable cause determination, that individual must do so under oath or affirmation. Information may also be presented by telephone, radio, or similar device to those empowered to authorize searches and seizures and apprehensions, and the authorizing official may administer the required oath over such devices. In addition to sworn or affirmed information presented to the authorizing officer pursuant to a request for an authorization to search and seize or an authorization to apprehend, such information as may then be personally known by the authorizing official that would not preclude the officer from acting in an impartial fashion may be used.

5-10. Form of oath for probable cause searches and seizures and apprehensions. No specific form of oath or affirmation is required as long as it imposes upon the requestor a moral or legal responsibility for the correctness of the information. The following oath or affirmation, as appropriate, may be administered to persons providing information supporting request for autauthorizations to search and seize, and autauthorizations to apprehend.

[14] Para. 5-9, AR 27-10.

[15] The opinion in *Stuckey* clearly leaves Judge Cook and Judge Fletcher with the approaches they had earlier adopted. Judge Cook adhered rigidly to the notion that in military practice it was not necessary to have an oath or affirmation cloaking the probable cause determination. Historically, this requirement had never been applied. United States v. Stuckey, 10 M.J. 347 (C.M.A. 1981) (Cook, J., concurring in part and dissenting in part). Similarly, Judge Fletcher maintained his original position on the need for the oath. United States v. Stuckey, 10 M.J. 347, 365 and 366 (C.M.A. 1981) (Fletcher, J., concurring in the result. He contended the requirement was derived from the specific language of the fourth amendment and there was no military exigency which would allow deviation.

[16] Clearly, it becomes the swing vote on this particular issue, and hence imperative to understand.

[17] Chief Judge Everett reasoned that an authorization to search, *see* Mil. R. Evid. 315(b)(1) was not a search warrant, *see* Mil. R. Evid. 315(b)(2) and therefore did not come within orbit of the fourth amendment practice. He additionally submitted that a commander was not a "magistrate" in the constitutional sense but acquired power from the President.

[18] *See* United States v. Stuckey, 10 M.J. 347, 361 (C.M.A. 1981). Chief Judge Everett advanced the contention that "[a] military commander who fails to obtain evidence under oath when it is feasible for him to do so has neglected a simple means for enhancing the reliability of his probable cause determination ... Just as a commander's use of sworn evidence helps sustain his determination of probable cause, his care as to other related matters makes his finding of probable cause more readily supportable." *Stuckey* at 364, 365.

In short, it appears that Chief Judge Everett will take each case on an *ad hoc* basis. Every question concerning an oath would be examined by a two step process. First, was it "reasonable" under the circumstances to require an affidavit? If so, second, was the oath or affirmation properly administered?

The Analysis

The foregoing constitutional, case and regulatory authorities will raise a number of questions concerning the propriety of an oath in a given case. Some of these will be explored. In considering the possible avenues of attack on thought, above all, must be maintained. The requirement for the imposition of an affirmation imposed by the fourth amendment,[19] the most onerous standard, is nothing more or less than it specifically appears to be! There are no sophistications or nuances historically appended to the concept.[20] The sole purpose of the affirmation is to ensure the responsibility of the person providing the information.[21] The complexity of the swearing process is solely a function of the underlying authority which creates it.[22] If a law or statute provides simply for an oath without detailing other procedural conditions, no additional actions will be required of the affiant.

Authority to Swear

Who can swear an individual to information? A number of individuals possess this authority. Clearly, one authorized to direct a search or seizure may do so.[23] Army Regulation 27-10 provides that "[c]ommanders... tordinarily will perform the function of administering the required oaths to persons presenting information to them." Thus, the regulation contemplates that a commander normally will swear an informant to the information presented.

Occasionally, information which was previously sworn will be presented to a commander or military judge. Army Regulation 27-10 seems to indicate that *only* where facts are presented in *writing* may individuals other than the authorizing official administer an oath.[24] In this situation the class of persons empowered to impose the oath is expanded in accordance with authority contained within the Uniform Code of Military Justice.[25] It

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[19] It should be noted that the oath or affirmation requirement solely applies to the warranted or authorized situation. It plays no role in the situation of a "reasonable" search or seizure. *See* note 1, *supra*.

[20] The history of the swearing requirement is rather uncomplicated. Prior to the American Revolution, even the despised writs of assistance in Massachusetts, were required to be supported by information under oath. N.B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* at 66 (1970) [hereinafter cited as Lasson]. Although the provision of the Virginia Bill of Rights from which the fourth amendment was modeled did not have such a requirement, the prototype submitted to the Constitutional Convention manifested this addition. The requirement remained intact and was adopted without apparent comment or debate. Lasson at 79 and 96.

[21] Lasson at 120.

[22] *See generally* United States v. Doe, 19 F.R.D. 13 (DC E.D. TN 1956) (procedure promulgated by Congress within Fed. R. Crim. P. 41 permitted commissioners to issue search warrants). Lasson at 120.

[23] *See* note 11 and accompanying text.

[24] Para. 5-9, AR 27-10.

[25] *See* 10 U.S.C. § 936(a) which states (emphasis supplied):

> The following persons on active duty may administer oaths *for the purposes of military administration*, including military justice, and have the general powers of notary public and of a consul of the United States, in the performance of all notarial acts to be executed by members of any of the armed forces, wherever they mae be, by persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Canal Zone, Puerto Rico, Guam, and the Virgin Islands, and by other persons subject to this chapter outside of the United States:
>
> (1) All judge advocates of the Army, Navy, Air Force, and Marine Corps.
> (2) All law specialists.
> (3) All summary courts-martial.
> (4) All adjutants, assistant adjutants, acting adjutants, and personnel adjutants.
> (5) All commanding officers of the Navy, Marine Corps, and Coast Guard.

should be observed, however, that although the Uniform Code of Military Justice authorizes some individuals to administer an oath any time they are involved in "military administration," other individuals are permitted to administer an oath only when their specific duties call for them to act.[26]

The more difficult extension of the initial inquiry is whether a civilian official not included in a military regulation is a proper authority.[27] Illustratively, what result would come of a situation where a civilian notary public within the office of a staff judge advocate administered an oath to an informant? Army regulations would not seem to be an impediment to the activity. They only cover the conduct of military personnel. The sole limitation on the oath administration process is that service members who can direct searches or seizures must normally, though not always, swear the informant.[28]

Timing

When must the oath be imposed? In some situations the affirmation will be made before the statement is received by the official who is to issue the authorization. Army regulation permits an oath to be previously rendered. It provides that "[w]here written information is provided by message or written statement, other persons authorized to administer such oaths may do so, and the authorizing official may accept representations by the person providing the information that this has been done."[29] Inherent in this notion is the presumption of regularity in governmental affairs. The idea is deeply anchored in judicial decision,[30] thus providing the necessary shield against unfounded defense contentions that an affiant was, in fact, not sworn.

In a 'normal' situation an oath is administered *before* information is presented. In other situations the oath may be administered *after* the statement is provided to the authorizing official. This is of no consequence. Sufficient judicial authority condones this approach providing the affiant understands that the information being related was sworn to.[31]

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(6) All staff judge advocates and legal officers, and acting or assistant staff judge advocates and legal officers.
(7) All other persons designated by regulations of the armed forces or by statute.

[26] *See* 10 U.S.C. § 936(b) providing:

The following persons on active duty may administer oaths necessary in the performance of their duties:

(1) The president, military judge, trial counsel, and assistant trial counsel for all general and special courts-martial.
(2) The president and the counsel for the court of any court of inquiry.
(3) All officers designated to take a deposition.
(4) All persons detailed to conduct an investigation.
(5) All recruiting officers.
(6) All other persons designated by regulations of the armed forces or by statute.

[27] *Cf.* Albrecht v. United States, 273 U.S. 1 (1926) (notary public's affidavit supporting federal warrant deemed insufficient to properly cover information upon which arrest based). Fed. R. Crim. P. 41(c)(1) requires that a search or seizure warrant "shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge . . ." *But cf.* McGrain v. Daugherty, 273 U.S. 135 (1927) (arrest warrant was predicated on report of a Senate committee); United States v. Copeland, 538 F.2d 639 (5th Cir. 1976) (informant's affidavit supporting federal search warrant properly considered although not sworn to before state judge and instead in front of criminal investigator otherwise authorized to administer oaths).

[28] Para. 5-9, AR 27-10.

[29] *Id. See also* State v. Penansky, 231 S.E.2d 152 (Court of Appeal of Ga, 1976); Goggins v. State, 203 S.E.2d 767 (Court of Appeal of Ga, 1974); Simon v. State, 515 P.2d 1161 (Okl. Cr. 1973).

[30] *Cf. Ex parte Bollman and Swartwout,* 4 Cr. 75, 2 L. ed. 554 (1807) (A magistrate who is properly acting in office is cloaked with a presumption that requisite oaths were taken); *United States v. Saunders,* 6 M.J. 731 (A.C.M.R. 1978) (command line deemed to provide presumption that officials acted in accordance with regulation in selecting judge and counsel for court-martial).

[31] *See* Frazier v. Roberts, 441 F.2d 1224 (8th Cir. 1971); Naples v. Maxwell, 393 F.2d 615 (6th Cir. 1968). Evaluation of what the affiant thought he or she was doing is a matter of fact for the Court to decide. *Frazier v. Roberts, supra* at 1228. *See also* Gillespie v. United States, 368 F.2d 1 (8th Cir. 1966).

Misrepresentation

What is the effect of misrepresenting the identity of the affiant? Jurisdictions are not in harmony concerning the result of this type of fraud.[32] Nevertheless, there is significant federal authority to support the unconstitutionality of a false-name affidavit.[33] The rationale for this outcome is bifurcated. It is that:

(1) "someone must take the responsibility for the facts alleged, giving rise to the probable cause for the issuance of the warrant"[34] and

(2) correct identification is essential to enable constitutional challenge of the underlying affidavit.[35]

As a matter of practice, the situation should never be permitted.[36]

Long Distance Swearing

What result follows when an informant is sworn in other than a face-to-face situation? Military procedure does not require a personal confrontation to administer the oath.[37] The logic which sustains such a course of conduct is unimpeachable.

> The moral, religious and legal significance of the undertaking remains the same whether the oath taker and the witness communicate face-to-face or over the telephone.
>
> In a ritualistic sense, it may be that an oath taken over the telephone appears less formal or less solemn than one taken in the physical presence of the oath taker. The constitutionality of oaths does not depend, however, on such purely ritualistic considerations.[38]

A number of cases decided at the turn of the century held that the failure of an affiant to be physically present before the officer administering an oath was void and without effect.[39] The reasons generally provided were that the activity did not comport, at least in spirit, with the statute which demanded the oath, or the requisite solemnity for an oath was not met.[40] The rationale supporting the foregoing cases would not appear to be viable today. These opinions were rendered at a time when electrical and radio transmissions were new to use. Presently, these means of communication are an integral part of society.[41]

Information Sworn

On occasion a question arises regarding what was actually sworn to. The problem can come up in various ways. For example, it may be that more than one individual swears to information in an affidavit. This creates a doubt as to who swore to which facts. Moreover, it may leave some facts completely unsworn to.[42] Alternatively, a multiple num-

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[32] *See generally* LaFave, *Search and Seizure A Treatise on the Fourth Amendment* (1978) § 4.3(f) [hereinafter cited as LaFave].

[33] *See* King v. United States. 282 F.2d 398 (4th Cir. 1960).

[34] *Id.*

[35] *Id. See also* Franks v. Delaware, 442 U.S. 928 (1978).

[36] Indeed, law enforcement officials should not involve themselves in conduct of this nature as an ethical matter. *See* ABA, Criminal Justice Standards 3-3.1(b).

[37] Para. 5-9, AR 27-10 provides that "[i]nformation may also be presented by telephone, radio, or similar device to those empowered to authorize searches and seizures and apprehensions, and the authorizing official may administer the required oath over such devices."

[38] *United States v. Turner,* 558 F.2d 46, 50 (2d Cir. 1977).

[39] *See generally* Annotation, *Acknowledgment or oath over telephone,* 12 A.L.R. 538.

[40] *Id.*

[41] "In the one hundred years since Alexander Graham Bell invented the telephone Long Distance has truly become, in the words of the well-known advertisement, "The next best thing to being there." The Fourth Amendment is sufficiently flexibible to account for such technological advances." United States v. Turner, 558 F.2d 46, 50 (2d Cir. 1977).

[42] *See, e.g.,* Masiello v. United States, 304 F.2d 399 (D.C. Cir. 1962).

ber of documents may be submitted for consideration to the judge. In either event, as long as all statements are under oath, or at least incorporated by reference in a 'cover' affidavit, no meritorious grounds for challenge would seem to exist.[43] When a law enforcement officer makes an application for a search authorization and places all the information being presented under the umbrella of an affirmation, the constitutional prerequisite will be fulfilled.

Oath Format

What form must the oath or affirmation take? Army regulation does not provide a fixed statement which must be uttered.[44] This guideline is in consonance with the underlying significance of the oath.[45] It has been stated that:

> [n]o particular ceremony is necessary to constitute the act of swearing to an affidavit for search warrant. It is only necessary that something be done in the presence of the magistrate issuing the search warrant which is understood by both the magistrate and the affiant to constitute the act of swearing.[46]

The crux of this issue is that it must be discernable that the affiant *swore* to what was being stated and was not merely making a bare assertion of fact.[47] It is irrelevant to the validity of the process that the maker of the statement did not raise a hand up or place a hand on a Bible while undertaking the invocation.[48]

Clerical Error

On occasion, information will be presented in the authorization process which is incorrect due to a typographical or clerical error. If the same information correctly appears elsewhere in the sworn facts being provided, no additional swearing is necessary when the judge or law enforcement officer corrects the mistake.[49] Conversely, if a correct sworn recitation of the facts are not available, the authorization would not be constitutionally sufficient. Hence, upon recognition of this type of error the correct facts should be attested to and all the information resubmitted for consideration by the judge.

Conclusion

Based on the present position of the judges of the Court of Military Appeals, information supporting a request for a search or seizure authorization must, as a matter of practical necessity, be made under oath or affirmation. A commander cannot afford to provide the defense with an opportunity to attack a probable cause determination as being either unconstitutional or unreasonable. Moreover, the procedure of using affidavits seems to be with military practice to stay. Regulations once established are not easily changed.[50]

The essence of the swearing requirement should be readily apparent. It is clear that

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[43] *See, e.g.*, United States v. Buschman, 386 F. Supp. 822 (D. WI. 1975). *See generally* LaFave § 4.3(d).

[44] *See* AR 27-10, para. 5-10, note 11, *supra*. Instead, a form is recommended along with a caveat that any affirmation is appropriate "as long as it imposes upon the requestor a moral or legal responsibility for the correctness of the information."

[45] *See* note 3, *supra*.

[46] Loudermilk v. State, 177 P.2d 129, 130 (Okla. Crim. 1947).

[47] *See generally* Annotation, *Formalities of Administering or Making Oath*, 51 A.L.R. 840.

[48] *Id.*

[49] United States v. Bowler, 561 F.2d 1323 (9th Cir. 1977).

[50] Setting aside any constitutional requirement, a regulatory scheme (see note 11, supra) establishes the oath requirement. A lasps in fulfilling it would be a fatal defect in the authorization process. *Cf.* United States v. Hood, 7 M.J. 128 (C.M.A. 1979) (trial judge failed to comply with AR 27-10 which requires extrinsic questions and answers put to an informant to be reduced to writing) and United States v. Dillard, 8 M.J. 213 (C.M.A. 1980) (search authorization not carried out in accordance with provision of regulatory supplement).

the requirement does not create an onerous burden for the government. It is easily imposed[51] and lacks susceptibility to appellate attack.[52] Any acknowledgement which touches the soul of the affiant suffices. In short, the simplicity of the requirement itself serves to neutralize any allegations of error raised by the defense regarding the propriety of the affirmation.

[51] *See* United States v. Stuckey, 10 M.J. 347, (C.M.A. 1981).

[52] Nothwithstanding Chief Judge Everett's comment that "sworn testimony may present formidable administrative difficulties and lead to many suppression hearings hinging solely on whether a commander administered an oath to a witness in the proper form," United States v. Stuckey, 10 M.J. 347, 364 (C.M.A. 19881, it is suggested that this article refutes that proposition.

The Court of Military Appeals at a Glance

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Benjamin N. Cardozo once said, "Justice is not to be taken by storm. She is to be wooed by slow advances."[1] In August 1980, some four months after he joined the Court of Military Appeals,[2] Chief Judge Everett addressed the Fourth Annual New Developments Course at The Judge Advocate General's School. Once attendee asked the Chief Judge whether he felt that as his predecessor, he had a mandate. Judge Everett smiled and stated that he had no "menu," however, he felt that he had at least four objectives. First, he wanted to keep the case load of the court as current as possible. That meant deciding old cases and coming to grips with redundant issues. Second, he wished to encourage law reform through assistance in implementation of the Military Rules of Evidence and needed reform of the Manual for Courts-Martial. Third, he wished to engage in favorable relationships and wipe the slate clean with regard to instances where the court may have previously caused hostilities. Finally, he wished to make all persons aware that military law and lawyers are first class.

Even a cursory review of the decisions rendered by the court since Judge Everett's appointment indicates that military justice is undergoing change but that it is not being wooed by slow advances. The change, to be precise, has been more swift and more government oriented than many had dared to speculate. These factors plus the relatively short time that the Everett court has worked together, make it difficult to forecast, at least with any accuracy, the course of the new court. Adding to this dilemma is the fact that the court has dealt with a multitude of diverse topics, which include: convening authority actions;[3] admissibility of civilian convictions during sentencing;[4] trial counsel arguments;[5] appeals while the appellee is AWOL;[6] government proof of chain of cus-

[1] B. Cardozo, The Growth of the Law 133 (1924).

[2] Hereinafter referred to as "the court".

[3] In United States v. Dixon, 9 M.J. 72 (C.M.A. 1980), the court reaffirmed the proposition that where a convening authority takes an action contrary to that recommended by his SJA he should state the reasons for his action in a letter transmitted to The Judge Advocate General. In United States v. Johnson, 10 M.J. 213 (C.M.A. 1981), and United States v. Mitchell, 10 M.J. 220 (C.M.A. 1981), the court observed that Dunlap v. Convening Auuthorit, 48 C.M.R. 751 (C.M..A. 1974), applies to all cases *tried* before the date of United States v. Banks, 7 M.J. 92 (C.M.A. 1979) (18 June 1979).

[4] In United States v. Cook, 10 M.J. 138 (C.M.A. 1981), the court said that all prior misconduct is relevant in sentencing and found a civilian record admissible notwithstanding the fact that the civilian court had withheld adjudication.

[5] In United States v. Horn, 9 M.J. 429 (C.M.A. 1980), the court condemned a prosecutor's use (twenty-eight times) of "I think" during his arguments.

[6] In United States v. Schrech, 9 M.J. 217 (C.M.A. 1980), the court allowed the lower appellate court decision to

tody;[7] counsel rights;[8] court member challenges;[9] use of handwriting samplers by the military judge;[10] pleadings;[11] miscalculation as to maximum sentences during a guilty plea;[12] proper considerations by a convening authority during referral;[13] participation by appellate judges in reconsiderations;[14] defense access to government witnesses;[15] and extraordinary writs.[16] The impact of these varied decisions on the military society may never really be gauged. Nevertheless, a "topic" comparison reveals that a majority of the court's decisions fall into one or more of the following themes or categories: the emergence of the military defense

be served on accused's appellate counsel for petition purposes where the accused was AWOL. Later (10 M.J. 226) the court observed it would dismiss the petition within thirty days if the accused was still AWOL.

[7] In United States v. Fowler, 9 M.J. 149 (C.M.A. 1980), the court overlooked a four hour gap in the chain where "manicured" marijuana had been tested by apprehending officers and at the precinct. And in United States v. Courts, 9 M.J. 285 (C.M.A. 1980), the court allowed the government to show an unbroken chain over cocaine because of its identification through peculiar packaging.

[8] In United States v. McDonald, 9 M.J.81 (C.M.A. 1980), the court declined to extend United States v. McOmber, 1 M.J. 380 (C.M.A. 1976), to a situation where an accused was held in military confinement on marijuana offenses and the FBI interviewed him on bad check offenses without contacting the accused's counsel. The court did find in United States v. Edwards, 9 M.J. 94 (C.M.A. 1980), that, absent extraordinary circumstances, only an accused could terminate an attorney/client relationship prior to appeal.

[9] In United States v. Tippit, 9 M.J. 106 (C.M.A. 1980), the court opined that a mere predisposition to give a certain sentence would not support a challenge against a court member. The defense would have to show that the court member had a closed mind—inelastic attitude or unwillingness to follow instructions and consider other factors.

[10] In United States v. Alfred, 10 M.J. 170 (C.M.A. 1981), the court allowed a military judge to compare a properly admitted handwriting specimen with the writing on the document in question, to prove that it was or was not the accused's handwriting. The court concluded that United States v. Conley, 4 M.J. 327 (C.M.A. 1978) was distinguishable because the judge there was a certified documents examiner.

[11] In United States v. Yum, 10 M.J. 1 (C.M.A. 1980), the court considered a pleading alleging that the accused impersonated a CID agent. Reviewing the history and intent of 18 U.S.C. § 912 which proscribes similar conduct, the court observed that for the accused to be criminally liable, the pleading must allege, and the government prove, that the accused committed an overt act other than mere impersonation.

[12] In United States v. Walls, 9 M.J. 88 (C.M.A. 1980), and United States v. Hunt, 10 M.J. 222 (C.M.A. 1981), the maajority of the court (Everett and Cook), felt that there was no magical mathematical miscalculation formula which would vitiate a plea. In *Hunt*, the court overlooked a "1000 per cent difference" preferring to look to the whole record and accused's acknowledgement that the maximum punishment could be less.

[13] In United States v. Means, 10 M.J. 162 (C.M.A. 1981), the court found that it was not improper for the convening authority to consider that the accused was an officer when referring the case to trial.

[14] In United States v. Fimmano, 9 M.J. 256 (C.M.A. 1980), a daily journal entry, Chief Judge Everett reviewed the history of a request for reconsideration where a new judge is on the bench and those still on the bench were divided when the case was originally heard. Everett concluded he would not sit on reconsideration; the case would stand, but *not* as precedent for future similar cases.

[15] In United States v. Killebrew, 9 M.J. 154 (C.M.A. 1980), the court observed that the government has a right to protect its informants, but that interest must be balanced against the defense's legitimate interest in meaningful access to that witness. Consequently the government may not intentionally block access to its witnesses.

[16] In Soriano v. Hosken, 9 M.J. 221 (C.M.A. 1980) the court denied relief where the accused sought a court order directing that forreign counsel be permitted to defend him. The court found that the right to civilian counsel was important, but that the foreign counsel had to demonstrate competence on the record. In Berta v. United States, 9 M.J. 390 (C.M.A. 1980), the court found that it was improper to held a military accused in pretrial confinement simply for his protection. The facts reveal that Berta had committed offenses in January 1980 and that his case had not gone to trial by July 1980 when he intervened in a disturbance. The next day he was assaulted for his efforts in breaking up the fight and spent eight days in the hospital. The convening authority, thereafter placed Berta in pretrial confinement for his own protection and to prevent retaliation by Berta.

counsel; the need to protect governmental interests; the recognition that certain issues have outlived their importance; and the acknowledgement of the Military Rules of Evidence. While this article is not intended as a compendium of the court's latest decisions, it will hopefully examine these forementioned categories highlighting where possible the stance of the court in each of it's major thrusts. Additionally, this article will demonstrate the herculean effort by the new chief judge to unify the membership of the court.

A. Statistics . . . Solidarity in Decisions

From July 1980 through February 1981, the Court of Military Appeals has rendered approximately seventy written opinions. Those decisions cover approximately twenty topics areas, with approximately twenty-five percent of the decisions devoted to the admissibility of Nonjudicial Punishment Forms (Article 15). Probably the most striking statistic is the solidarity of opinions. Over sixty percent of the court's written opinions have been "3–0" decisions, whether they be in the form of *per curiam*, concurring, or concurring in the result. The most dissents have been filed by Judge Cook, mainly in the area of the admissibility of nonjudicial punishment for sentencing purposes, while Chief Judge Everett has yet to dissent. After several years of turmoil, the court appears to have entered a period of tranquility. This solidarity may be short lived, however, because the court has taken what appears to be a pro government stance.

B. Holding Defense Counsel Accountable

Excepting some notable and isolated decisions,[17] the court has reversed course by recently placing defense counsel on notice that they must run their own cases and account for their actions on the record. Additionally, the court appears to have taken a non-paternalistic approach, removing what formerly had been *sua sponte* duties of the trial judge, making them the burden of the defense counsel. Specifically, the Court of Military Appeals has decided that defense counsel are under a duty to seek clarification of instructions; speak up on the record where they believe the trial judge's explanation of an agreement does not coincide with their own understanding; object to the admissibility of laboratory reports if they wish to preserve a sixth amendment confrontation issue; proffer a meaningful indication that examination of the chemist will cast doubt on his competence or process reliability before the chemist will be summoned at government expense to testify at trial; and object to defective government forms or suffer the consequence of waiver.

In *United States v. Salley*,[18] the court, per Judge Everett, grappled with the form of a reasonable doubt instruction given to the court members. In his instructions to the court, the military judge explained that "Now, by reasonable doubt is intended not a fanciful or ingenious doubt or conjecture but *substantial*, honest, conscientious doubt suggested by the material evidence or lack of it in this case." The court agreed with defense appellate counsel that such an instruction, while it may appear in the Army's Military Judge's Guide, is held in disfavor by most federal appellate courts. The court noted, however, that where, as here, there was no objection at trial, there has been a reluctance to reverse. Specifically, the court noted that decisions like *Grunden* and *Graves*[19] ". . . do not relieve defense counsel of the obligation to seek clarification of instructions which deal with an issue but do so in unclear, imprecise, or ambiguous language." Judge Fletcher's concurrence without opinion may cause a moment of reflection, however, in light of the fact that he was the author of both *Graves* and *Grunden*.[20]

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[17] A good example of one of the few recent instances that the court has placed heavy duties on the defense counsel can be observed in United States v. Rivas, 3 M.J. 282 (C.M.A. 1977). There the court announced that an accused is entitled to competent counsel who exercises that competence without omission throughout the trial.

[18] 9 M.J. 189 (C.M.A. 1980).

[19] 2 M.J. 116 (C.M.A. 1977) and 1 M.J. 50 (C.M.A. 1975).

[20] Both decisions imposed a *sua sponte* duty on military judges to properly instruct the court members on certain issues, irrespective of defense counsel's desires.

Three months later the court reaffirmed this decision in *United States v. Cross.*[21] In curt language the court announced that it would not allow an accused to object to instructions on appeal which were not objected to at trial. In *United States v. Cotten,*[22] the court obviously found the factually correct case to discuss the results where a defense counsel properly monitored the judge's instruction to insure its legal correctness. There the court reversed that accused's conviction, because counsel not only objected to the faulty reasonable doubt instruction, but proposed a substitute instruction.

In a *per curiam* decision in *United States v. Passini,*[23] the court reviewed a *Green*[24] inquiry where the military judge failed to ask a comportment question. In an announcement that can only be viewed as an acceptance of "substantial compliance," the court concluded that counsel are "under a *duty* to reveal in open court any discrepancy between the pretrial agreement and their understanding thereof" [emphasis added].

The court has had several opportunities to consider the Sixth Amendment ramifications to an accused where a laboratory report is admitted into evidence at a drug trial. In *United States v. White,*[25] the court specifically addressed the issue of confrontation where the accused's guilt was shown through the laboratory report. A unanimous court citing *United States v. Strangstalien*[26] opined that, where the trail defense counsel did not object to the introduction of the laboratory reports or request production of the chemist for purposes of cross-examination, the accused was not denied his sixth amendment right to confrontation.

In this same vein, the court reviewed in *United States v. Vietor,*[27] the standards for requesting the presence of defense witnesses at trial. Specifically, the defense had requested the presence of the drug analyst some three days prior to trial. The convening authority had not acted on the request and at trial the defense asserted that the witness was needed to determine the procedures used to demonstrate that the substances analyzed were marijuana. After the defense acknowledged that it had not contacted the chemist the military judge denied the request stating that there was no indication that the chemist was unqualified or his procedures incorrect. A divided court found that the presence of a laboratory analyst was not required by the sixth amendment as a condition precedent for admissibility of the laboratory report. In separate opinion, Judge Cook found that the defense counsel should be required to provide the trial court with a meaningful indication that examination of the analyst would adduce favorable evidence for the accused before the analyst's presence would be required. Judge Everett, who concurred in the result, did not go as far, but indicated that the defense had to at least contact the analyst. Judge Fletcher reiterated the position he had taken in *Strangstalien*[28] that the defense need only make an affirmative request for the analyst's presence and he may be summoned for cross-examination. Reading the opinions of Cook and Everett together, it would appear that the defense now shoulders at least the burden of demonstrating a good faith need to examine the witness at trial.

In *United States v. McLemore,*[29] a *per curiam* court (Everett and Cook) reviewed the admissibility of a Navy Article 15 form. The court found the form objectionable in several instances, but observed the potentially fatal problem to be the fact that the form did not provide sufficient space to record all the information

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[21] 10 M.J. 34 (C.M.A. 1980).

[22] 10 M.J. 260 (C.M.A. 1981).

[23] 10 M.J. 108 (C.M.A. 1980).

[24] United States v. Green, 1 M.J. 453 (C.M.A. 1976).

[25] 9 M.J. 168 (C.M.A. 1980).

[26] 7 M.J. 225 (C.M.A. 1979).

[27] 10 M.J. 69 (C.M.A. 1980).

[28] 7 M.J. 225 (C.M.A. 1979).

[29] 10 M.J. 238 (C.M.A. 1981).

needed to establish its admissibility. The court reasoned that this was different from the form not being filled out, and therefore the responsibility rested on the defense counsel to object and if he did not the matter was waived.

C. Turning Right: "Protection of Governmental Interests"

At no time in the past decade has the Court of Military Appeals so clearly embraced the concept that the military is different from the civilian society. Consequently, it has a heightened need to protect itself, and therefore the soldiers' individual expectations and "rights" may be subjugated to those of the military. Specifically, the Court has broadened subject and *in personam* jurisdiction of the military, has carved away at the breadth of Article 31, and has re-recognized the governmental right to conduct inspections and use the fruits of such inspections at trial.

1. Broadened Jurisdiction

a. *In personam.* In *United States v. Bridgeford,*[30] the court was asked to consider the breadth of Article 2, UCMJ, where the accused, a reservist, was called back for involuntary active duty. Bridgefore voluntarily enlisted in the Army Reserve for six years. He served a brief period of active duty training. Approximately one year later he was ordered to active duty again in accordance with Army Regulation 135–91 (unsatisfactory reserve participation). Bridgefore reported for duty and did not contest his recall until his trial which occured some six months after his reactivation. A *per curiam* court found that where, as here, the accused was aware of a right to object to his activation and did not until his defense counsel raised the issue at trial, he waives an objection that the court-martial lacks jurisdiction because there was no showing that he had been properly recalled to active duty.

b. *Subject matter.* Even when the court announced an end to the *Beeker*[31] approach in resolving jurisdictional questions relating to drug offenses, the court opined that negotiations occuring on post may bring the off-post sale within the military's jurisdiction.[32] This theory was most recently reaffirmed by a unanimous court in *United States v. Cornell.*[33] There the accused agreed (on post) to sell an agent drugs and arranged a rendezvous off-post.

The court's recent opinion in *United States v. Trottier,*[34] however, may eventually prove to be the *Beeker* of the 80's. Trottier and a soldier (OSI agent) to whom the accused had previously sold drugs met by chance at an apartment complex in Oxon Hill, Maryland, off-post. At the time both the accused and the soldier (agent) were not in uniform. When the accused made an offer to sell drugs, however, he knew that the soldier (agent) intended the drugs for resale on post. The court, per Chief Judge Everett, concluded, "[t]he gravity and immediacy of the threat to military personnel and installations posed by the drug traffic and by drug abuse convince us that very few drug involvements of a service person will not be 'service connected'." The court's analysis was based heavily on the 5th and 6th *Relford*[35] factors, *i.e.,* the war powers—the impact of drugs on the modern armed forces, and the connection between the accused's military duties and the crime. The court cautioned that it had not returned completely to the *Beeker* doctrine, and it had not changed the pleading requirements of *Alef.*[36] Concurring in the result, an apprehensive Judge Fletcher observed that the majority opinion was no more than a *Beeker* clone. Moreover, he opined that cases like *United States v. Courts*[37] and *United States v. Mack,*[38] disclosed to him a lessening of the requirement for the

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[30] 9 M.J. 79 (C.M.A. 1980).

[31] United States v. Beeker, 40 C.M.R. 275 (C.M.A. 1969).

[32] United States v. McCarthy, 2 M.J. 26 (C.M.A. 1976)

[33] 9 M.J. 98 (C.M.A. 1980).

[34] 9 M.J. 337 (C.M.A. 1980).

[35] Relford v. Commandant, 401 U.S. 355 (1971).

[36] 3 M.J. 414 (C.M.A. 1977).

[37] 9 M.J. 285 (C.M.A. 1980).

[38] 9 M.J. 300 (C.M.A. 1980).

government to fulfill its obligation under the law to meet the letter of the law.

In two cases that can only be classified as *Trottier*[39] progeny, the majority of the court continues to weigh the affect that drugs will have on the military population. In *United States v. Norman,*[40] the court looked to such facts as: the accused's buyers were known to him as fellow servicemen; one was a former member of the same squadron; the buyers were known as dealers; and the quantity sold was for resale on post to other servicemembers. The majority (Everett and Cook) go so far as to indicate that even if the drugs were intended for off-post use by the buyers, this still is at odds with an efficient military operation. The latest case *United States v. Smith*[41] was before the court following a grant of a government request for reconsideration. The accused had been charged and pleaded guilty to conspiracy to sell and possession of marijuana. The record discloses that Smith and a fellow soldier conspired to pool their money, buy marijuana, and return to post to sell the marijuana to members of their company. The court originally granted the accused's petition, finding no jurisdiction over the possession offense. On reconsideration the majority (Everett and Cook) reversed itself, finding jurisdiction over both the conspiracy and possession. The majority rationalized that such "conduct is inimical to the efficient operation of the military" and such conduct can be reached for prosecution by the military.

2. Limitation of the Breadth of Article 31, UCMJ

In a series of cases the court has literally given Article 31, UCMJ, a face-lifting. The court has opined that Article 31(b) does not protect neutral requests for a person's identity, and that blood extracts, handwriting and voice exemplars are not protected by the privilege against self-incrimination. The court has established a dual standard for determining who must warn and under what circumstances Article 31 warnings must be given.

In *United States v. Davenport,*[42] the accused was charged and pleaded guilty, *inter alia,* to making a false official statement in violation of Article 107, UCMJ. According to Davenport's providence inquiry, he had escaped from custody and a Staff Sergeant Welsh had been assigned to ensure that Davenport was the correct person to be brought back into military custody. In performing his official duties, the sergeant asked Davenport his name and the accused responded by given a fictitious name. The court found that Article 31 was never intended to be used as a license to lie. Moreover, since the sergeant was fulfilling his duties and the accused was under an independent duty to "account" for his time and whereabouts, Article 31 should not be so broad as to protect a neutral act such as disclosing one's name.

In *United States v. Armstrong,*[43] the accused had an auto accident in which a fellow soldier was killed. Armstrong ran from the scene only to be apprehended by the German police. Thereafter he was confronted by a military policeman who smelled alcohol on Armstrong's breadth. Armstrong was told that he was suspected of driving under the influence of alcohol, that he could remain silent, and that he could refuse a blood alcohol test at the American hospital. He was also advised, however, that such conduct would mean revocation of his USAREUR permit and the Germans could extract his blood by force if necessary. Armstrong thereupon agreed to the test, which established his legal intoxication. In a lengthy opinion, the court reviewed previous military and federal decisions and the Congressional intent of Article 31(b). The court concluded that the words interrogate and statement in Article 31(b) were not meant to protect that which did not amount to a communication. Moreover, if body fluids were meant to be protected, Article 31(b) would

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[39] 9 M.J. 337 (C.M.A. 1980).

[40] 9 M.J. 355 (C.M.A. 1980).

[41] 9 M.J. 359 (C.M.A. 1980).

[42] 9 M.J. 364 (C.M.A. 1980).

[43] 9 M.J. 374 (C.M.A. 1980).

have been written to include production of evidence. Chief Judge Everett, in dicta, extended Article 31's "non" coverage to handwriting and voice exemplars, a matter not joined by Cook and Fletcher. Judge Everett's language concerning handwriting should not come as a surprise, however, considering the majority opinion in *United States v. McDonald*[44] where the court found Article 31, UCMJ, was not applicable to an FBI request for handwriting exemplars from a servicemember while he was in military confinement.

In *United States v. Lloyd*,[45] the court was specifically called upon to determine whether Article 31, UCMJ, protected handwriting exemplars. Lloyd had originally been suspected of violating ration control regulations. Further investigation revealed, however, that he had reported the loss of his ration and ID cards. It appeared, therefore, that someone had used Lloyd's cards and forged Lloyd's signature at the time of purchase. To test the theory, Lloyd was asked to produce his (new) identification card, by the MPI and CID. Unfortunately, the ID card produced by Lloyd was one issued to him before the date he reported it lost. Lloyd was immediately advised of his Article 31 rights, which he waived. He thereafter provided an admission that the cards were never lost. The court found that like blood specimens, handwriting and voice exemplars are not protected by the privilege against self-incrimination. Following its rationale in *Armstrong*,[46] the court also observed that there was no need to provide warnings before requesting a suspect to give a handwriting sample or produce a document containing his signature or handwriting so it can be used for comparison purposes. In more interesting language, the court expounded on *Davenport*[47] and expressed the belief that authorities could even request production of the ID card to establish a soldier's identity. According to the court, even if production of the card was a statement it was so neutral as not requiring warnings. As he had previously written in *Armstrong*,[48] Everett alone concluded voice exemplars were not protected. Everett's reasoning is so basic, however, that it is clear that Cook and Fletcher are merely waiting until the factually correct case is presented so they may join the Chief Judge.

Finally, in *United States v. Duga*,[49] maybe the most critical of this line of cases, the court was called upon to determine whether Congress had intended a literal application of Article 31(b) to the military society. Specifically, would service persons of relatively equal rank be required to warn each other of their rights each time they engaged in conversation where there was a possibility one may incriminate himself.

The facts of record indicate that members of the Office of Special Investigations had sought out an Airman Byers, a security policeman, and had queried him about Duga's potential involvement in several thefts. When the OSI concluded their talk with Byers, they told him if he could give any more information, it wouuld be helpful. That night, the accused came to Byers' security post. The two engaged in a "buddy to buddy" conversation during which the accused made several incriminating statements. The next night, Byers and the accused engaged in further conversations in which the accused detailed his criminal conduct. Two days later Byers "voluntarily" went to the OSI office and informed them of what had transpired. At trial these admissions were offered and accepted into evidence over defense objection that no Article 31(b) warnings had preceded the questioning by Byers.

The court, per Judge Everett, found that Article 31(b) applies only to situations in which, because of military rank, duty or similar relationship, there may be subtle pressure on a suspect to respond to an inquiry. Applying that ra-

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[44] 9 M.J. 81 (C.M.A. 1980).

[45] 10 M.J. 172 (C.M.A. 1981).

[46] 9 M.J. 374 (C.M.A. 1980).

[47] 9 M.J. 374 (C.M.A. 1980).

[48] 9 M.J. 374 (C.M.A. 1980).

[49] 10 M.J. 206 (C.M.A. 1981).

tionale, therefore, each case must be evaluated on its own merits. That evaluation must specifically determine: (1) whether the questioner who is subject to the code was acting in an official capacity or by personal motivation in their inquiry and (2) whether the person questioned perceived that the inquiry involved more than a casual conversation. The court made clear that unless *both* prerequisites are met, Article 31(b) does not apply. Evaluating the facts here against this dual standard, the court found no need for Byers to preface his conversation with Article 31 when he talked to Duga. Specifically, the court relied on the fact that Byers was motivated by his own curiosity; Byers was not directed by the OSI to seek information; the accused himself was a security policeman and the accused outranked Byers. *Duga*[50] is obviously a fact specific case. Its value, however, lies in the flexible/workable dual standard used for determining the applicability of Article 31. This new test transcends and coalesces the "officiality" and "authority" tests of *United States v. Seay*[51] and *United States v. Dohle*[52] into one applicable standard.

3. Inspections/Searches

The Court of Military Appeals recently used an inspection conducted in 1975 as a vehicle for discussing service members' fourth amendment rights, the legality of health and welfare inspections, the ramifications of using dogs during such inspections, and the circumstances under which contraband found during an inspection may be admissible at a court-material. In *United States v. Middleton,*[53] a company commander decided to conduct a health and welfare inspection of his unit, in accord with battalion policy that such inspections be conducted quarterly. The commander decided to utilize a drug detection dog during the inspection and was fully advised of the dog's capabilities and reliability three weeks before and the morning of the inspection. After the inspection began, the commander proceeded on his own, conducting a traditional inspection. The dog and her handlers proceeded on their own. When the dog entered Middleton's room she alerted on Middleton's locked wall locker. The commander was called and observed the dog conduct her pattern and her alert. The accused was summoned, told what had transpired and allowed to see the canine perform her alert. Middleton was thereafter advised he was under apprehension, and advised of his Article 31 rights. After being told that the dog's alert gave the commander probable cause, the accused consented to a search of his locker and unlocked it for his commander. An examination of the locker revealed marijuana.

In an exhaustive examination of the law, the court, per Chief Judge Everett, reviewed the applicability of the Fourth Amendment to the military, allowing that the expectations of privacy in the military may differ from those in a civilian community because unique conditions exist in the military as a result of its specialized status. In that vein the Court observed that military inspections are "time-honored" and have been specifically recognized through precedent as legitimate tools of the commanders. Consequently, during a traditional inspection, service members whose area is subject to the inspection cannot reasonably expect privacy which will be protected from the inspection. Moreover, a commander may utilize the services of a dog during the inspection, allowing the dog to walk areas that are "public" (within range of the inspection). If the dog walks the public area and detects odors outside the inspection, the canine's detection may serve as probable cause for a search into the private area. The court then took a long look at its earlier opinion in *United States v. Thomas,*[54] concluding

[50] *Id.*

[51] 1 M.J. 201 (C.M.A. 1975).

[52] 1 M.J. 223 (C.M.A. 1975).

[53] 10 M.J. 123 (C.M.A. 1981).

[54] 1 M.J. 397 (C.M.A. 1976). While Judge Cook voted to reverse the conviction in Thomas on narrow grounds, it is clear that he viewed the inspection as a valid activity, thus making evidence found to be admissible

that there should be a preferable alternative to an exclusionary rule for the evidence found in an inspection. The court suggested a balancing test, much like that in *Terry v. Ohio,*[55] *i.e.,* a need to protect the police from injury and a need to protect citizens from indiscriminate invasions of privacy. In what could be a hint of things to come, Judge Everett suggested that Military Rule of Evidence 313(b) had such a balance. He declined to rule on its legality, but concluded that, under some circumstances, contraband found during an inspection may be admissible, *i.e.,* those circumstances must establish a true inspection.

Notwithstanding the expansiveness of this case and Chief Judge Everett's commendable effort in bringing together the previously diverse opinions of Cook and Fletcher on this matter, this case presents some hard questions for the SJA in the field. For example, is the court explicitly blessing the use of dogs during an inspection? May that inspection include examination for contraband? Just as troublesome is the question, what is "public," how does it become "public," and may a commander change the parameters of "public" once the inspection has begun? Finally, the casual observer can not help but wonder whether this decision ameliorates the court's former hard stand in *United States v. Ezell,*[56] especially when the court dealt with the commander's presence and "search authorization" at the scene in a mere footnote. Less than six weeks before *Middleton,*[57] the court, per Chief Judge Everett, issued its opinion in *United States v. Rivera.*[58] The court there observed that where a commander received tips, investigated them to develop probable cause and participated in the search, he was not neutral and detached and thus not a proper party to authorize the search. On this matter it is difficult to reconcile the two cases. Consequently, the cautions SJA may be wise to err on the side of conservatism and advise that *Ezell*[59] is still good law.

D. End Of An Era

In keeping with his pledge to keep the court's docket current, Chief Judge Everett has apparently rung the death knell on three of the most redundant issues at the court. Specifically, the court has found that deterrence is a proper function of sentencing, "substantial compliance" in a judge's *Green*[60] inquiry is acceptable, and Article 15's may be used during sentencing as long as they are completed properly.

1. Arguing and Instructing on Deterrence

In *United States v. Lania,*[61] the court placed itself back in step with civilian practice after it withdrew from *United States v. Mosely.*[62] Specifically, the court found that general deterrence is a proper function of sentencing. Consequently, the trial counsel may argue and the military judge may instruct on deterrence as long as they do not do so to the exclusion of other sentencing factors. Both Chief Judge Everett and Judge Cook explained that *Mosely*[63] intentionally made military practice different for approximately four years because of the court's previous fear that a trial counsel's argument for general deterrence might result in more severe punishments without consideration to an individual's rehabilitation. The court found no reason to insulate court members any longer from such a

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at trial based on the plain view doctrine. Judge Fletcher also gave the commander much power to inspect his unit, but prohibited the admission of evidence of a crime at trial. See Cook, *the United States Court of Military Appeals, 1975–1977: Judicializing the Military Justice System,* 76 Mil. L. Rev. 158 (spring 1977).

[55] 392 U.S. 1 (1968).

[56] 6 M.J. 307 (C.M.A. 1979).

[57] 10 M.J. 123 (C.M.A. 1981).

[58] 10 M.J. 55 (C.M.A. 1980).

[59] 6 M.J. 307 (C.M.A. 1979).

[60] 1 M.J. 453 (C.M.A. 1976).

[61] 9 M.J. 100 (C.M.A. 1980).

[62] 1 M.J. 350 (C.M.A. 1976).

[63] *Id.*

proper sentencing consideration, as long as the court members are made fully aware of other factors. This concept was reiterated in *United States v. Thompson,*[64] a *per curiam* opinion.

In *United States v. Geidl,*[65] the court had an opportunity to closely scrutinize a sentencing argument made by the prosecutor over defense objection. The prosecutor argued that "a stiff, hard sentence . . . is a deterrent to crime." After defense counsel's objection was overruled, the prosecutor continued by suggesting that the maximum punishment "is a recognized deterrent to crime." He concluded by pointing out that the maximum punishment would be a deterrent to people who might commit a similar crime. Reviewing the standards of *Lania,*[66] the court was convinced that this argument was on the borderline of propriety. The judges all felt, however, that the accused was not prejudiced where the military judge fully and fairly instructed on other sentencing factors as well as deterrence, and a pretrial agreement substantially reduced the adjudged sentence.

There can be no question now but that the military law on general deterrence is marching to the same drum beat as that in the federal sectors. There is also no question, however, that the court will closely review arguments and sentencing instructions to ensure that court members are made aware of a sufficient quantity of sentencing factors, so that fair and just sentences are imposed.

2. The Green Inquiry . . . Will Substantial Compliance Be Enough?

With the advent of *United States v. Passini,*[67] the casual observer can only believe that the Court of Military Appeals is finally willing to accept that justice can be accomplished where the *Green*[68] inquiry is substantially complied with. In *Passini,*[69] a case tried *after United States v. King,*[70] the military judge failed to ask counsel whether the defense's and government's understanding of the pretrial agreement comported with his. In less than one hundred words, the court found that the agreement was so simple that it was susceptible of only one interpretation. In any event, if counsel had a different understanding of the agreement than that explained by the military judge at trial, the government and defense were under a duty to reveal a different understanding in open court, citing *United States v. Crowley.*[71]

In *United States v. Hinton,*[72] another post-*King*[73] deal inquiry, the court had an opportunity to examine the failure of the military judge to ask the accused whether he understood the cancellation provisions of the agreement and the judge's failure to ask counsel whether their understanding of the agreement other than the quantum portion comported with his understanding. A unanimous court looked to the entire "providency inquiry" finding that the judge's explanations of the agreement established that the accused understood the "essence" of the cancellation agreement, that he had to plead guilty or the

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[64] 9 M.J. 166 (C.M.A. 1980).

[65] 10 M.J. 168 (C.M.A. 1981).

[66] 9 M.J. 100 (C.M.A. 1980).

[67] 10 M.J. 108 (C.M.A. 1980).

[68] 1 M.J. 453 (C.M.A. 1976).

[69] 10 M.J. 108 (C.M.A. 1980).

[70] 3 M.J. 458 (C.M.A. 1977). The court, per Judge Fletcher, announced in *King* that only strict compliance with the mandate of *Green* would be acceptable and the substantial compliance theory of United States v. Crowley, 3 M.J. 988 (A.C.M.R. 1977), would not be sufficient. The meaning of *King* and the sincerity of the court in their decision has always been suspect. To say the least the history of the court on this matter has been confusing. See Lause, Crowley, *The Green Inquiry Lost In Appellate Limbo,* The Army Lawyer, at 10.

[71] 3 M.J. 988 (A.C.M.R. *en banc* 1977), reversed, 4 M.J. 170 (C.M.A. 1977), *pet. for reconsideration granted,* 4 M.J. 272 (C.M.A. 1978), *affirmed,* 7 M.J. 336 (C.M.A. 1979).

[72] 10 M.J. 136 (C.M.A. 1981).

[73] 3 M.J. 458 (C.M.A. 1977).

convening authority was not bound. Moreover, had counsel understood the agreement differently than explained by the judge they were under a duty to reveal the discrepancy in open court.

The fact that *Passini*[74] and *Hinton*[75] are *per curiam* decisions should cause a moment of reflection, especially in light of the fact that Judge Fletcher authored *King*,[76] the case which totally rejected the theory of substantial compliance. Rationalization of these two diverse positions can only suggest that *King*[77] was a vehicle to raise *Green*[78] inquiries to an acceptable standard, and the court as a whole now believes that plateau has been reached.

In another pretrial agreement case, the court had an opportunity to examine what may have been the first "activated" misconduct—cancellation clause. In *United States v. Dawson*,[79] the accused's sentence included five years confinement. The pretrial agreement, which provided for cancellation if the accused committed misconduct in violation of the UCMJ between trial and the convening authority's action, limited any adjudged confinement to two years. After trial, Dawson was taken to the confinement facility were military police reports indicate a search of his clothes revealed drugs. The SJA made the convening authority aware of the report and advised the convening authority that he was no longer bound by the agreement. The convening authority consequently approved the adjudged sentence. Judge Fletcher, writing the lead opinion, found that such a clause was so vague that it could not be approved as part of the accused's agreement. Specifically, Fletcher was concerned that there were no provisions detailing who would determine guilt, by what standard guilt would be determined, and whether the accused could withdraw his plea. In a final note, Judge Fletcher admonished all would-be agreement writers that such clauses which entail waivers of constitutional or codal rights otherwise not waived by a guilty plea are void.

Chief Judge Everett concurred in the result. He left some ray of hope for such cancellation clauses though, indicating that, while this particular clause was void, if such clauses were to be used in the future the following safeguards must be provided: (a) detailed, explicit provisions, (b) full inquiry by the military judge (which was not done here) and (c) if "misconduct" occurs, a hearing which provides at least the safeguards of Article 72, UCMJ, should be conducted.

Judge Cook dissented, expressing the opinion that this whole matter could have been resolved through the SJA's review and the defense counsel's rebuttal to the review. Moreover, he suggested that in the past such provisions were not found to be against public policy and in fact a proper matter for consideration.

Judge Fletcher's opinion should give most SJA's sufficient cause to side-step this clause. Those SJA's heartened by the fact that the *Dawson*[80] case was not reversed, and Chief Judge Everett's approach, would be wise to follow Everett's cookbook without exception. The effect of this decision has to be tempered, however, in light of the minimal number of these clauses that are ever "activated".

3. The Article 15 Monster

The Court of Military Appeals has taken an apparent hard line on the admissibility of the DA Form 2627, Record of Nonjudicial Punishment. Specifically, it has announced that all the blocks on the form must be filled in to ensure its admissibility for sentencing purposes.

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[74] 10 M.J. 108 (C.M.A. 1980).

[75] 10 M.J. 136 (C.M.A. 1981).

[76] 3 M.J. 458 (C.M.A. 1977).

[77] *Id.*

[78] 1 M.J. 453 (C.M.A. 1976).

[79] 10 M.J. 142 (C.M.A. 1981).

[80] *Id.*

In several cases, the court denied admissibility of the form and even required reassessment of the sentence where: blocks 3 through 6 were left blank;[81] the accused's signature after his choice of forum was illegible;[82] and where the accused requested appellate action and none was apparently taken;[83] or appellate action was required and none was apparently taken.[84]

The court has indicated, however, that blanks on the form may be accounted for by independent evidence which will make the form admissible. *United States v. Gordon*.[85] Moreover, Article 31, UCMJ does not apply to the sentencing stage and therefore an accused may lawfully be compelled over his objection by a military judge to respond to an inquiry by the military judge in an effort to supply mandated information to make an otherwise inadmissible DA Form 2627 admissible. *United States v. Spivey*.[86] In that case the military judge asked the accused over defense objection whether he had been advised of his right to consult counsel prior to imposition of punishment and whether he had exercised his right to appeal. The accused answered that he had, and the military judge admitted the forms for sentencing.

In *United States v. Mack*,[87] the court attempted to provide the definitive answer on the use of admissible Article 15 forms. In this voluminous decision, each judge voiced his own opinion. Judge Everett wrote the lead opinion and dealt with summary court convictions as well as the DA Form 2627. He concluded that the military accused do not have the right to counsel in nonjudicial or summary court proceedings. He further found, however, that if an accused was not provided advice of counsel for a summary court, that conviction could not be used to esculate the punishment under Section B of paragraph 127(c) MCM (this parenthetically also applies to the Article 15 if paragraph 127 is ever changed) and cannot be used for impeachment purposes. The fact that the accused never consulted counsel, however, would not prevent the admissibility of a summary court conviction to rebut an accused's statement that he has never been convicted. As regards the DA Form 2627, and consultation of counsel, Everett concluded that to enhance the admissibility of the form, the accused had to sign the form after the information which described the location of counsel and the 72 hours time the accused has to decide what he wants to do. Despite dissenting opinions by Judge Cook who believed these standards too high and Judge Fletcher who sought stricter admission standards, the bottom line for admission appears to be that the DA Form 2627 will be admissible for sentencing where all the blocks are filled or the government accounts for the gaps. Where the form is complete on its face there will be a presumption of regularity mooting the question of whether the accused was given the opportunity to consult counsel, subject of course to an accused's attack.

E. Acknowledgement of the Military Rules of Evidence

In spite of the fact that the Military Rules of Evidence did not come into effect until 1 September 1980, and thus the orderly process of military appeals could not yet have been tasked with commenting on the legality of such Rules, the Court of Military Appeals has gratuitously acknowledged at least ten of the Rules: 103(a)(1), 103(d), 105, 301, 304(h), 312, 313, 314(e), 315 and 803(6) and (8).

In *United States v. McLemore*,[88] (trial date 1978) the court commented on the defective nature of a Navy Article 15 form and found

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[81] United States v. Negrone, 9 M.J. 171 (C.M.A. 1980).

[82] United States v. Cross, 10 M.J. 34 (C.M.A. 1980).

[83] United States v. Gordon, 10 M.J. 31 (C.M.A. 1980).

[84] United States v. Burl, 10 M.J. 48 (C.M.A. 1980). United States v. Guerrero, 10 M.J. 52 (C.M.A. 1980).

[85] 10 M.J. 31 (C.M.A. 1980).

[86] 10 M.J. 7 (C.M.A. 1980).

[87] 9 M.J. 300 (C.M.A. 1980).

[88] 10 M.J. 238 (C.M.A. 1981).

that the counsel's failure to object waived the matter. The court then specifically noted that the Rules have taken an expansive view of waiver by failure to object, citing Rule 103(a)(1). The court was apparently noting that counsel under the new Rule must make a *timely* and sufficiently *specific* objection to prevent waiver for trial *and* appeal purposes.

In *United States v. Fowler*[89] and *United States v. Wray*[90] (pre Rule cases), the court addressed the appropriateness of military judges honoring defense counsels' tactical choice not to have the court instructed on uncharged misconduct. The court specifically found that each judge's action did *not* constitute error. Moreover according to the court (as of 1 September 1980), Rule 105 removes the *sua sponte* responsibility of the military judge to instruct on uncharged misconduct, except when failing to instruct would constitute plain error under Rule 103(d).

In *United States v. Dowell,*[91] the court was confronted with the admissibility of statements made by a confined accused after he was served with additional charges by his commander. The court was also concerned with admissions by silence (Pragraph 140*a*(4), MCM 1969) under the same circumstances. In a footnote, the court commented that even though Military Rule of Evidence 304(h)(3) would make such admissions by silence inadmissible under like circumstances (confinement), the reality of human nature remains the same, that is, when a confined solider is served more charges and is not rewarned of his right to silence he is likely to make admissions of guilt.

In *United States v. Armstrong,*[92] the court was concerned with the question of whether blood extracts were protected by Article 31(b), UCMJ, and in discussion covered three of the military rules. In concluding that blood extracts were not covered by Article 31(b), the lead opinion noted that it preferred the use of "body fluid" to that of "bodily fluids" of Rule 312(d) and that nonconsenual seizure of body fluids could be obtained through use of Military Rules 312 and 315. In the concurring opinion written by Judges Cook and Fletcher, the two judges agreed with the view expressed in Rule 301 that there was no reason for Article 31 to be extended to bodily fluids.

In *United States v. Middleton,*[93] where the court examined tomes of law concerning inspections, the majority specifically acknowledged Rule 313(b), its definition of "inspection" and its dual test which must be met before the contraband fruits of the inspection may be used in a criminal proceeding. The court, however, declined to decide the legality of the Rule or bless its application. Nonetheless, the court fully indorsed the standard of "clear and convincing" found in Rule 314(e)(5) which must be met by the government when showing consent was voluntarily given for a search.

Finally, in *United States v. McKinney,*[94] the court considered the government's petition for reconsideration after the court reversed the accused's conviction because it found that chain of custody forms were inadmissible per *United States v. Porter*[95] and *United States v. Neutze*.[96] The court determined that a rehearing may be ordered because there could be available evidence of record which could be a substitute for inadmissible evidence. The court acknowledged the future of Rules 803(6) and (8) but refused to reconsider the admissibility of the custody documents presumably because the case was decided two months prior to the effective date of the Rules.

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[89] 9 M.J. 149 (C.M.A. 1980).

[90] 9 M.J. 361 (C.M.A. 1980).

[91] 10 M.J. 36 (C.M.A. 1980).

[92] 9 M.J. 374 (C.M.A. 1980).

[93] 10 M.J. 123 (C.M.A. 1981).

[94] 9 M.J. 86 (C.M.A. 1980).

[95] 7 M.J. 32 (C.M.A. 1979).

[96] 7 M.J. 30 (C.M.A. 1979).

Obviously, the court's comments so far have been reserved because the court has not been specifically called upon to decide the Rules' legality. In the few decisions that have commented on the Rules, the trend appears to be that the court will receive them favorably. This should not be too much of a surprise, however, because many of the Rules are adopted directly from the Federal Rules, and the court had special advisors helping in the actual drafting of the Military Rules.

F. Conclusion

The fact that the composition of this court has done more to change military law in less time than any other court is somewhat of an understatement. Those changes, though, have been an enigma. The court has concomitantly recognized the uniqueness of the military society[97] and has significantly reduced the scope of Article 31, UCMJ, the keystone of military justice which set it apart from civilian law. Just as apparent is this court's desire to acknowledge that certain basic ethical norms apply to the military as well as the civilian society.[98]

If there is any criticism of the current court, it would be that it has moved too quickly. Contained therein is the fact that the court has taken, in some instances, positions one hundred and eighty degrees from its earlier stance. Whether this will later cause problems and whether Chief Judge Everett can maintain the unity of the court can only be answered with the passage of time.

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[97] On 5 February 1981, Chief Judge Everett addressed the A.B.A. in Houston, Texas, evincing a concern that the court's latest opinions "not prove unresponsive to the needs of military discipline."

[98] Everett, *Some Comments on the Civilianization of Military Justice,* The Army Lawyer, September 1980, at 1.

Computer Assisted Court Reporting System

by W01 Jerry K. Hashimura
Legal Administrative Technician, Headquarters, US Army Training Center and Fort Dix

Computer technology has finally caught up with the judicial system. Computers can now be found behind the closed doors of the courtroom. The use of computers to produce typewritten manuscripts has revolutionized court reporting in civilian courts. This technology can be applied to the military judicial system with beneficial results. Computer assisted transcription (CAT) will enable an office to drastically reduce both pretrial and post-trial processing time. Lengthy transcripts usually requiring over a month to prepare can now be prepared in *one* day.

A. The CAT System

The basics of the CAT system are easy to understand. A stenotype reporter, using a modified stenotype machine, reports the trial or hearing in the normal fashion. In addition to the standard paper notes printed by the steno machine, the stenotype notes (strokes) are recorded on a cassette tape. The paper notes act as a back up to the cassette. The reporter then places the cassette into the computer (cassette reader). The cassette reader translates the stenotype strokes into English. The reporter has two options for preparing the typed transcript. He can have the computer prepare a typewritten copy for editing or he can have the computer scroll the transcript onto the screen of a word processing machine which can be edited and then printed. The time required to prepare a transcript is limited only by the speed of the printer and the accuracy of the reporter's notes. In the SJA office at Fort Dix, it is estimated the CAT system (operating at peak efficiency) will produce 750 pages of transcript per day.

B. Application to the Military Setting

An SJA office can realize tremendous benefits utilizing the CAT system. Manpower and processing time can be saved. The speed of the CAT system allows an office to operate more efficiently with fewer court reporter personnel. Post-trial processing time attributable to the court reporter (and charged to the government) could be virtually eliminated. A record of trial (regardless of length and complexity) could be authenticated several days, rather than several weeks, after a trial. The speed of the CAT system will allow court reporters to be utilized in other areas of military justice. The CAT system can be applied to any task involving the preparation of a transcript, and need not be confined to the judicial setting. Potential users of the CAT system are numerous and would vary to some extent from installation to installation.

There are various problem areas involved in implementing the system, however, TO&E units, without augmentation TDA's, will not have civilian authorizations to hire against. There may also be problems in obtaining initial funding to purchase the equipment. Further, since the system presently is adaptable only to stenotype equipment, a program would be required to train military personnel in stenotype reporting, a two-year curriculum. This would be very expensive and could aggravate the retention problem of military court reporters.

In summary, the CAT system can save money, time, and increase the overall efficiency and effectiveness of an SJA office. Sounds almost too good to be true. However, it may not be suitable for every SJA office. Each office should investigate the possible use of the system, tailored to fit its particular workload and office configuration.

For further information or assistance, contact W01 Jerry Hashimura, Staff Judge Advocate Office, US Army Training Center and Fort Dix, NJ 08640, Autovon 944-3290/2498.

FROM THE DESK OF THE SERGEANT MAJOR

by Sergeant Major John Nolan

1. *Brigade Legal Clerk Positions.* Recent input from the field indicates that brigade legal clerk positions should be upgraded to E-7 for a number of reasons. Among them is that the brigade legal clerk serves as a primary liaison. A knowledgeable and experienced legal clerk who can render timely advice and implement and supervise the policies of the brigade commander, especially in case of deployment, is essential. Additionally, the brigade legal clerk acts as advisor and supervisor to legal clerks in subordinate units. Normal career progression would also suggest elevating the more senior and knowledgeable legal clerks to brigade positions. This natural progression is defeated when both battalion and brigade positions are authorized at the E-5 level. A formal recommendation that E-7 positions be restored at the brigade level has been reviewed and staffed through FORSCOM, TRADOC, and The Judge Advocate General's School, and is presently being reviewed by personnel officials on the Army Staff and at the US Army Soldier Support Center. If approved, this action will require a grade authorization change to AR 611-201. This will provide the expertise needed at brigade level, and will create additional E-7 positions throughout the Corps. I will provide update on this action in future articles.

2. *Continuing Legal Education Training.* On a test basis, we were recently allocated two quotas for the Air Force Legal Service Advanced Course at the Air Force Judge Advocate General's School, Maxwell Air Force

Base, Alabama, held 23 March–3 April 1981. SFC Bobbie R. Gidden from Fort Benjamin Harrision, Indiana, and SFC John Meehan, our Liaison NCO to MILPERCEN, were selected to attend the course. I also attended as a guest speaker, to discuss matters such as managing, training, and utilizing Army legal clerks and court reporters. Based on the very positive response from our two attendees, I expect to obtain a limited number of quotas for future classes.

During 8–12 April 1981, the FORSCOM Staff Judge Advocate, in conjunction with the Fort Carson Staff Judge Advocate, conducted a 2½ day workshop for legal clerks and court reporters at Fort Carson, Colorado. The purpose of the workshop was to provide general court-martial jurisdiction legal clerks and court reporters with a review and update on such military justice subjects as the revision of AR 27–10; records of trial; convening, promulgating, and supplemental orders; appeals; and other matters relating to military justice proceedings. Also it was designed to foster a better working relationship between OTJAG and Staff Judge Advocate office personnel in the field, especially in the area of criminal law.

The next classes of the Court Reporter Course will be held 31 August–9 October 1981, at the Naval Justice School in Newport, Rhode Island. Personnel desiring to attend this upcoming class should forward their request through channels to SFC Meehan at MILPERCEN.

There are a number of correspondence courses available from The Judge Advocate General's School in Charlottesville, and from the Institute for Professional Development, US Army Training Support Center, Newport News, Virginia. I encourage all personnel who are not currently involved in some type of continuing legal education program to review these courses for possible enrollment.

3. *SQT Preparation.* Legal clerks throughout the Army will be taking the SQT between 1 May and 31 October 1981. This will be the second time our legal clerks have taken the test. The test is a crucial examination which will influence the careers of our legal clerks. For this reason, I encourage all chief legal clerks to continue with their training programs or, for those who do not have a program, to establish one.

4. *MOS 71E (Court Reporter) SQT Update.* SFC Steven W. Widdis has recently joined SFC Randy Wilhite at the SQT Division of the US Army Soldier Support Center as the 71E half of the 71D/E team for design of the SQT. SFC Wilhite completed most of the groundwork on the 71E SQT, and SFC Widdis is currently working on minor revisions to the format of the test. There are some areas of the test over which our NCOs at the planning level have no control, as some tasks are dictated by TRADOC. I assure you, however, that your desires can and will be made known to the planners. So far little feedback has been received concerning the SQT plan sent to the MACOMs in December 1980. There is still time to provide comments, criticisms, and suggestions. SFC Widdis plans to visit some CONUS installations in June of this year to validate the tests. If you have specific questions or comments, please contact him at Fort Harrison, AUTOVON 699-3378/3125, or send your written comments to him at the following address:

Chief, SQT Division
US Army Soldier Support Center
ATTN: ATSG–TD–SQT(71E)
Fort Benjamin Harrison, IN 46249

With mutual cooperation we can devise a test format that will help our court reporters become truly competitive with their fellow soldiers in all areas.

5. *Court Reporting Equipment Test.* TRADOC recently approved an investment project for a Computer Assisted Transcription System. A summary of the system, by W01 Jerry K. Hashimura, Legal Administrative Technician, SJA Office, Fort Dix, New Jersey, is contained elsewhere in this issue.

6. *Reserve Component Strength.* Following are current strength figures for legal clerks and court reporters in the Reserve Components:

US Army Reserve

MOS	AUTH	ASGN
71D	731	676
71E	258	142

National Guard

MOS	AUTH	ASGN
71D	772	708
71E	81	61

7. **DA Selection Boards—CY 81.** Following is the schedule of these Department of the Army Selection Boards for the remainder of CY 1981 which will impact on enlisted personnel. All boards are conducted at Fort Benjamin Harrison, Indiana.

Board	Dates
ANCOC	31 Mar–1 May 81
CSM/CSM Retention	3 Jun–19 Jun 81
USASMA	14 Jul–31 Jul 81
E–9 Selection	9 Sep–25 Sep 81
E–8 Selection	27 Oct–20 Nov 81

If their records are to appear before a Department of the Army Selection Board, personnel should review their official Military Personnel File (OMPF) at least 90 days before the board is scheduled to convene. Personnel should additionally review their OMPF whenever there has been a material change to their records directed by the Army Board for the Correction of Military Records or the Department of the Army Suitability Evaluation Board. Individuals who wish to review their OMPF should request a microfiche copy from:

Commander
US Army Enlisted Records and Evaluation Center
ATTN: PCRE–RF–I
Fort Benjamin Harrison, IN 46249

8. **NCO Shoulder Marks.** NCO shoulder marks, which will include embroidered rank insignia, have been approved for wear by corporals, E–5s, and above. Soldiers in the rank of Private E–2 through Specialist Four will continue to wear polished brass rank insignia pinned to their green shirt collars as specified in AR 670–1, Wear and Appearance of Army Uniforms and Insignia. Although the expression "shoulder boards" has been used, the proper terminology is *"shoulder marks."* No mandatory wear date has been established for the new shoulder marks, which will be worn on the shoulder loops of the green shirt and the women's green blouse. However, the shoulder marks may be purchased and worn as optional items as soon as they are available.

American Bar Association Young Lawyers Division Midyear Meeting

By Captain Jan W. Serene, ABA/YLD Delegate
Administrative Law Division, OTJAG

The American Bar Association (ABA) held its 1981 Midyear Meeting in Houston, Texas, on 4–11 February 1981. In my capacity as TJAG's representative to the Young Lawyers Division (YLD) of the ABA, I attended meetings of various committees whose work potentially impacts on the JAG Corps and the young military practitioner.

The YLD is composed of all members of the ABA who are under thirty-six years or those admitted to the bar less than three years, and its membership comprises more than 50% of the total membership of the ABA. The Executive Council of the YLD acts in behalf of the Division between the annual meetings of the Division Assembly.

During the Midyear Meeting of the Executive Council, it was announced that the Kutak Commission on Evaluation of Professional Standards will issue a revised draft of

the proposed Model Rules of Professional Conduct. As a result of extensive comments received concerning the initial draft and the need for further revisions, submission of proposed rules for final ABA approval will be delayed until at least 1982. The upcoming draft will contain explanatory notes setting forth the changes proposed from the current rules.

Various resolutions were passed by the YLD Executive Council including recommendations for judicial sabbaticals, right to voir dire in Federal criminal cases, self-extinguishing cigarettes, grand jury reform, right to die with dignity statutes, brain death statutes, and support for legal services to the elderly. A resolution concerning the legal status of prisoners was defeated. Funds for publication this year of an additional (fifth) issue of the *Barrister* were denied because of a shortage of funds in the Division.

The YLD hosted the second annual Bar Leadership Institute, which is designed to assist young lawyers to become more effective leaders. One current development discussed was the outcome of the work done by the Devitt/King Committees. In 1979, the Judicial Conference of the United States passed all of the final recommendations of the Committee to Consider Standards for Admission to Practice in the Federal Courts (the Devitt Committee). The Devitt Committee urged the Judicial Conference to resolve that individual districts:

1. Require lawyers to pass a bar examination covering the Federal Rules of Civil Procedure, Criminal Procedure and Appellate Procedure, the Federal Rules of Evidence, Federal Jurisdiction, and the Code of Professional Responsibility, as a condition for admission to practice before Federal courts.

2. Require lawyers to have four supervised trial experiences, at least two of which involved actual trials in state or Federal court, as an experience requirement before conducting a civil trial or any phase of a criminal proceeding in the Federal Courts.

3. Establish a peer or performance review procedure to advise and give guidance to Federal bar members whose trial performances are substandard.

4. Adopt a student practice rule.

5. Support continuing legal education programs on trial advocacy and Federal practice subjects and encourage Federal bar members to attend.

The Devitt Committee recommended that the first three conditions (examination, experience and peer review) be instituted in pilot districts that wished to participate and that a special committee of the Judicial Conference be created to study the results. A new committee was constituted by the Judicial Conference and given the title of "Implementation Committee on Admission of Attorneys to Federal Practice" (the King Committee). The King Committee was charged by the conference to monitor, on a pilot basis, the examination, trial experience and peer review prodcedure requirement in participating district courts.

Fifteen district courts, representing 117 active judges or approximately one-fourth of the Federal trial bench in active service, will be participating in the experimental program. Although a manual has been prepared by the King Committee suggesting ways to implement the pilot project, the participating Districts are independent and are not bound by the manual resolutions of the Judicial Conference. The fifteen district courts participating in the experimental programs are: Central District of California, Northern Disstict of California, Northern District of Florida, Southern District of Florida, Northern District of Illinois, Southern District of Iowa, District of Maryland, District of Massachusetts, Eastern District of Michigan, Western District of Michigan, Western District of Pennsylvania, District of Puerto Rico, District of Rhode Island, Eastern District of Texas, and Western District of Texas.

At the midyear meeting the Military Service Lawyers Committee of the YLD hosted the Third Annual Joint Conference on Military

Lawyers. The joint conference coordinates the various bar committees having military-related interests. Representatives of state and national bar organizations reviewed current and future military-related projects of their respective committees with an eye toward coordination and avoiding needless duplication of efforts.

A Matter of Record

Notes from Government Appellate Division, USALSA

1. Judicial Notice

a. In cases involving cocaine charges, trial counsel should request that the military judge take judicial notice of the classification of cocaine under 21 USC § 801, *et seq*. Specifically, counsel should request that the military judge judically note 21 USC §§ 802 (16) and 812, and counsel should be prepared to present copies of these sections to the judge. *See* Military Rule of Evidence 201; *United States v. King*, 6 M.J. 927 (AFCMR 1979), *pet. denied*, 7 M.J. 214 (CMA 1979); *United States v. Zenor*, 1 M.J. 918 (NCMR 1976), *aff'd*, 3 M.J. 186 (CMA 1977).

b. Judicial notice is also appropriate when dealing with jurisdiction issues under *United States v. Alef*, 3 M.J. 414 (CMA 1977). The status of a military post is a fact which is "generally known . . . locally" and is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Military Rule of Evidence 201(b).

c. Another area in which judicial notice can be used to complete the Government's burden of proof is the authentication of laboratory reports. It has been judically determined that the regular course of business of a crime laboratory is to analyze suspected narcotics and report the results. *See United States v. Evans*, 21 USCMA 579, 45 CMR 353 (1972), and *United States v. Gillette*, CM 439503 (ACMR 26 February 1981).

2. Documentary Evidence

While the Military Rules of Evidence 103(a) may limit the *sua sponte* duty of the military judge to exclude documentary evidence which is incomplete or improperly prepared, trial counsel should insure that documents offered are properly prepared to avoid unnecessary appellate litigation. Recently an issue arose from the proffer of an incomplete promulgating order and a properly completed DA Form 2–2 prepared from that order. The trial counsel's attempt to remedy the defect in the authenticated promulgating order through an extract of that conviction (DA Form 2–2) created additional appellate errors. This type problem is easily avoided by insuring that documentary evidence is complete and correct when offered.

3. Advising Summary Court Officers

Often overlooked by judge advocates is the need to properly brief the summary court officer prior to his conducting a summary court-martial. In addition to advising him as to the procedural requirements of his duties, the judge advocate should acquaint him with the current legal responsibilities he assumes by virtue of his judicial role. The necessity for an in-depth inquiry into the providency of a guilty plea has become a well established subject of such a briefing; however, another important aspect pertaining to sentencing is being overlooked—automatic reduction to the lowest enlisted grade.

In a recent application submitted under the provisions of Article 69, UCMJ, The Judge Advocate General granted relief in a summary court-martial because the summary court officer who sentenced the accused to hard labor without confinement did not intend that he also be reduced to the lowest enlisted grade by operation of Article 58a, UCMJ. The summary court officer stated that

when he imposed the sentence he was not aware that the accused would be reduced to the lowest enlisted grade, and, had he known of the automatic reduction provision, he would have adjudged extra duty instead of hard labor without confinement.

HQDA message 171600 April 1979 (DAJA-CL 1979/5273) is reiterated: Staff judge advocates should insure that each non-JAGC officer appointed as a summary court-martial is thoroughly briefed on his duties and understands the automatic reduction to E-1 by operation of law under Article 58a, UCMJ.

Reserve Affairs Items

Reserve Affairs Department, TJAGSA

1. Army National Guard Special Assistant to The Judge Advocate General of the Army.

Brigadier General Paul N. Cotro-Manes, JAGC, ARNG, has assumed his position as special assistant and principal advisor to The Judge Advocate General, U.S. Army, and Director, Army National Guard, for judge advocate personnel management and military law matters pertaining to the Army National Guard. Prior to assuming his present position he was the Staff Judge Advocate for the Utah Army National Guard.

Brigadier General Cotro-Manes graduated from the University of Utah School of Law and was admitted to practice in Utah in 1954. However, he was commissioned originally in Artillery in 1954. He graduated from the officer Basic Artillery Course, Provost Marshal Officer Course, Judge Advocate Advance Course, and Judge Advocate General Staff Course. He also attended the National Strategy and Defense Seminars of the National War College. BG Cotro-Manes has been a member of the Judge Advocate General's Corps since 1961.

2. Army National Guard Liaison Officer.

Major Louis R. (Buddy) Hardin, Jr., JAGC, ARNG, has assumed full time duties as the Army National Guard Liaison Officer at The Judge Advocate General's School. Major Hardin, a 1969 graduate of the Cumberland School of Law, Samford University, was engaged in the private practice of law in Jacksonville, Florida, prior to being selected by The Judge Advocate General and the Director of the Army National Guard for this assignment. As the ARNG liaison officer, he reviews applications for appointment or branch transfer with federal recognition to the JAGC, ARNG; effects liaison among TJAGSA, National Guard Bureau, and various state Adjutants General; and provides advice and guidance on all aspects of career management to individual ARNG JAGC officers. Major Hardin may be reached via the ReserveAffairs Department, TJAGSA, at (804) 293-6121, FTS 938-1301/1209 or by autovon 274-7110 and requesting 293-6121 when the operator answers.

3. Judge Advocate Reserve Components General Staff Course.

For Officers Enrolled with TJAGSA.

Reminder. All correspondence subcourse materials for the Judge Advocate Reserve Components General Staff Course have been mailed to students. Completion of all correspondence subcourses is a prerequisite to attendance at the resident phase. *All* correspondence course enrollments will be terminated on 6 July 1981. No extensions of enrollment or waivers of the prerequisite will be granted. If you have not received your materials or are having difficulties, contact the Reserve Affairs Department.

For Officers Transferring to JARCGSC.

Transfer to JARCGSC must be completed before a quota or orders can be obtained for the resident phase.

JAGC Personnel Section

PP&TO, OTJAG

1. Reassignments

LIEUTENANT COLONEL	*FROM*	*TO*
CHUCALA, Steven	Ft Belvoir, VA	WRAMC, Wash, DC
RICE, Leonard	Ft McNair, Wash, DC	USALSA, Wash, DC
MAJOR		
BEARDALL, Charles	TDS, Ft Knox, KY	Panama
CARTER, Victor	Schofield Barracks, HI	TDS, Ft Campbell, KY
COSTELLO, Raymond	Ft McPherson, GA	USAREUR
FRANKLIN, Douglas	USALSA, Wash, DC	TDS, Ft Lewis, WA
FRICK, Ralph	Ft Lewis, WA	USAREUR
GANSTINE, Robert	USALSA, Wash, DC	USAREUR
GOO, Lester	USAREUR	Ft Ord, CA
KELLY, Jerome	USALSA, Wash, DC	Ft Belvoir, VA
LEMBERGER, Jerome	USAREUR	OTJAG, Wash, DC
LUNDBERG, Steven	Ft Campbell, KY	Ft Carson, CO
MERCK, Larry	Ft Knox, KY	USAREUR
NORTON, James	TDS, Ft Leonard Wood, MO	USALSA, Korea
SAYNISCH, Stephen	USAREUR	Ft Knox, KY
SHELTON, Sam	TDS, Ft Richardson, AK	Ft Wainwright, AK
SMITH, James	OTJAG, Wash, DC	Ft Bragg, NC
STOKESBERRY, John	USALSA, Korea	Ft McClellan, AL
WILLIAMS, Larry	Ft Ord, CA	USAREUR
WRIGHT, Richard	OTJAG, Wash, DC	USALSA, Wash, DC
CAPTAIN		
CALLAGHAN, Tim	Ft Bliss, TX	Herlong, CA
CAMERON, Dennis	USALSA, Wash, DC	Ft McNair, Wash DC
CANDEE, Roland	Ft Sill, OK	TDS, Ft Sill, OK
CAREY, David	Korea	Ft Shafter, HI
CARTER, Kevin	Ft Knox, KY	OTJAG, Wash, DC
DAVIDSON, Selmer	Herlong, CA	Ft Bragg, NC
DELORIO, Dominick	TDS, Schofield Barracks, HI	USAREUR
DRONEN, Elyce	Stu Det, Sacramento,, CA	Presidio, CA
FITZGIBBONS, John	Ft Gordon, GA	Fitzsimmons AMC, CO
FLOWERS, Richard	TDS, Ft Carson, CO	Ft Gordon, GA
FRANZEN, Eric	Schofield Barracks, HI	S&F, USMA, NY
GIBSON, James	Ft Knox, KY	TDS, Schofield Barracks, HI
HAYS, Patricia	USAREUR	Ft Campbell, KY
HAYS, Thomas	USAREUR	Ft Campbell, KY
JONES, Robert	TDS, Schofield Barracks	Ft Gillem, GA
JORDAN, Paul	Ft Devens, MA	USALSA, Wash, DC
KACZYNSKI, Stephen	Schofield Barracks, HI	TDS, Schofield Barracks, HI
KANE, Stephen	Ft Bragg, NC	TDS, Ft Bragg, NC
LAFRANCE, Margaret	USALSA, Wash, DC	MTMC, Wash, DC

CAPTAIN	*FROM*	*TO*
LEVASSEUR, William	Ft Benning, GA	TDS, Ft Benning, GA
LUJAN, Thomas	Schofield Barracks, HI	TDS, Schofield Barracks, HI
MACKAY, Scott	Stu Det, Boston, MA	Ft Campbell, KY
McQUADE, Brian	Ft Benning, GA	Ft Devens, MA
McSHANE, Thomas	TDS, Ft Carson, CO	Korea
MEYER, Kent	Ft Knox, KY	Ft Ord, CA
MORELLO, Steven	USAREUR	Ft Sheridan, IL
MOTZ, Patricia	USAREUR	USALSA, Wash, DC
OLEARY, Thomas	TDS, Ft Polk, LA	USAREUR
PARK, Sarah	Ft Knox, KY	USAREUR
PARKERSON, John	Ft Monmouth, NJ	USAREUR
PEACE, Jerry	Ft Jackson, SC	USAREUR
PHILLIPS, Dennis	Stu Det, Albany, NY	TDS, Ft Riley, KS
PRETZER, Randall	TDS, Ft Rucker, AL	USAREUR
REYNOLDS, Arthur	Aberdeen PG, MD	Ft Sam Houston, TX
SCHMIDLI, James	Stu Det, Jefferson City, MO	Ft Stewart, GA
SHAW, John	TDS, Ft Stewart, GA	Ft Ord, CA
SMITH, John	Ft Bragg, NC	TDS, Ft Bragg, NC
SMITH, Robert	Stu Det, Salt Lake City, UT	Ft Knox, KY
SWANN, Robert	TDS, Ft Lewis, WA	TDS, Ft McPherson, GA
TANNER, Shelby	TDS, Korea	Ft McClellan, AL
THEBAUD, Charles	Stu Det, Harrisburg, PA	Ft Gordon, GA
VELLING, Daniel	TDS, Ft Meade, MD	USALSA, Wash, DC
VENEMA, William	Stu Det, Richmond, VA	Stu, TJAGSA, VA
VITALE, Dale	Ft Devens, MA	TDS, Ft Rucker, AL
WEEDEN, Norman	Ft Dix, NJ	USAREUR
WILLIAMS, Harry	Stu Det, Sacramento, CA	TDS, Ft Polk, LA
WILSON, William	Ft Riley, KS	USALSA, Wash, DC
WRIGHT, Douglas	Stu Det, Salt Lake City, UT	Ft Sill, OK
CW3		
CAMIRE, Walter	Korea	Ft Meade, MD
HALL, William	USAREUR	Ft Leonard Wood, MO
HERTLI, Peter	Ft Rucker, AL	USAREUR
McCORMICK, Dennis	USALSA, Wash, DC	OTJAG, Wash, DC
CW2		
GILLIS, James	USAREUR	USALSA, Wash, DC
LARGESSE, Richard	Ft Monmouth, NJ	Ft Devens, MA
TUCKER, Larry	USAREUR	Presidio, CA
WO1		
PRIBIL, Jakob	Ft Riley, KS	USAREUR

2. Promotions

LIEUTENANT COLONEL

ANDERSON, Gary
KELLY, Jerome

MAJOR

BOONSTOPPEL, Robert
BUSH, Brian
DUFFY, Thomas

MAJOR

GRUCHALA, Harry
PALMER, Randall
URECH, Everett

3. Retirements

HALL, Rupert P., COL
MINTON, David, COL
TALIAFERRO, Wallace, COL

CLE News

1. TJAGSA CLE Courses

June 1–12: 88th Contract Attorneys (5F–F10).

June 8–12: 61st Senior Officer Legal Orientation (5F–F1).

June 15–26: JAGSO Reserve Training.

July 6–17: JAGC RC CGSC

July 6–17: JAGC BOAC (Phase IV).

July 20–31: 89th Contract Attorneys (5F–F10).

July 20–August 7: 23d Military Judge Course (5F–F33).

July 26–October 2: 96th Basic Course (5–27–C20).

August 10–14: 62nd Senior Officer Legal Orientation (5F–F1).

August 17–May 22, 1982: 30th Graduate Course (5–27–C22).

August 24–26: 5th Criminal Law New Developments (5F–F35).

September 8–11: 13th Fiscal Law (5F–F12).

September 21–25: 17th Law of War Workshop (5F–E42).

September 28–October 2: 63d Senior Officer Legal Orientation (5F–F1).

2. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. Quota allocations are obtained from local training offices which receive them from the MACOM's. Reservists obtain quotas through their unit or RCPAC if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. Specific questions as to the operation of the quota system may be addressed to Mrs. Kathryn R. Head, Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22901 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS 938-1304).

3. Civilian Sponsored CLE Courses

July

9–18: MCLNEL, Trial Advocacy, Cambridge, MA.

10–13: SBT, Advanced Family Law, Houston, TX.

10–14: AAJE, Judicial Performance, Charlottesville, VA.

10–14: NWU, Prosecuting Planning Institute, San Francisco, CA.

13–14: PLI, Estate Planning Institute, San Francisco, CA.

14: OLCI, Wills and Trusts, Toledo, OH.

17–21: AAJE, Law of Evidence, Stanford, CA.

17–21: FPI, The Skills of Contract Administration, Las Vegas, NV.

20–21: PLI, Basic Tax Planning, San Francisco, CA.

21: OLCI, Wills and Trusts, Cincinnati, OH.

24–27: SBT, Advanced Criminal Law, San Antonio, TX.

24–28: AAJE, Constitutional Criminal Procedure, Durham, NH.

27–28: PLI, Environmental Law & Practice, New York City, NY.

28: OLCI, Wills and Trusts, Columbus, OH.

For further information on civilian courses, please cntact the institution offering the course, as listed below:

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020.

AAJE: American Academy of Juudicial Education, Suite 437, Woodward Building, 1426 H Street NW, Washington, DC 20005. Phone: (202) 783-5151.

ABA: American Bar Association, 1155 E. 60th Street, Chicago, IL 60637.

AICLE: Alabama Institute for Continuing Legal Education, Box CL, University, AL 36486.

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104.

ARKCLE: Arkansas Institute for Continuing Legal Education, 400 West Markham, Little Rock, AR 72201.

ATLA: The Association of Trial Lawyers of America, 20 Garden Street, Cambridge, MA 02138.

BCGI: Brandon Consulting Group, Inc., 1775 Broadway, New York, NY 10019.

BNA: The Bureau of National Affairs Inc., 1231 25th Street, N.W., Washington, DC 20037.

CALM: Center for Advanced Legal Management, 1767 Morris Avenue, Union, NJ 07083.

CCEB: Continuing Education of the Bar, University of California Extension, 2150 Shattuck Avenue, Berkeley, CA 94704.

CCH: Commerce Clearing House, Inc., 4025 W. Peterson Avenue, Chicago, IL 60646.

CCLE: Continuing Legal Education in Colorado, Inc., University of Denver Law Center, 200 W. 14th Avenue, Denver, CO 80204.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53706.

DLS: Delaware Law School, Widener College, P.O. Box 7474, Concord Pike, Wilmington, DE 19803.

FBA: Federal Bar Association, 1815 H Street, N.W., Washington, DC 20006. Phone: (202) 638-0252.

FJC: The Federal Judicial Center, Dolly Madison House, 1520 H Street, N.W., Washington, DC 20003.

FLB: The Florida Bar, Tallahassee, FL 32304.

FPI: Federal Publications, Inc., Seminar Division Office, Suite 500, 1725 K Street NW, Washington, DC 20006. Phone: (202) 337-7000.

GCP: Government Contracts Program, George Washington University Law Center, Washington, DC.

GICLE: The Institute of Continuing Legal Education in Georgia, University of Georgia School of Law, Athens, GA 30602.

ICLEF: Indiana Continuing Legal Education Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204.

ICM: Institute for Court Management, Suite 210, 1624 Market St., Denver, CO 80202. Phone: (303) 543-3063.

IPT: Institute for Paralegal Training, 235 South 17th Street, Philadelphia, PA 19103.

KCLE: University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506.

LSBA: Louisiana State Bar Association, 225 Baronne Street, Suite 210, New Orleans, LA 70112.

MCLNEL: Massachusetts Continuing Legal Education—New England Law Institute,

Inc., 133 Federal Street, Boston, MA 02108, and 1387 Main Street, Springfield, MA 01103.

MOB: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson City, MO 65101.

NCAJ: National Center for Administration of Justice, Consortium of Universities of the Washington Metropolitan Area, 1776 Massachusetts Ave., NW, Washington, DC 20036. Phone: (202) 466-3920.

NCATL: North Carolina Academy of Trial Lawyers, Education Foundation Inc., P.O. Box 767, Raleigh, NC 27602.

NCCDL: National College of Criminal Defense Lawyers and Public Defenders, Bates College of Law, University of Houston, Houston, TX 77004.

NCDA: National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. Phone: (713) 749-1571.

NCJFCJ: National Council of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8978, Reno, NV 89507.

NCLE: Nebraska Continuing Legal Education, Inc., 1019 Sharpe Building, Lincoln, NB 68508.

NDAA: National District Attorneys Association, 666 North Lake Shore Drive, Suite 1432, Chicago, IL 60611.

NITA: National Institute for Trial Advocacy, University of Minnesota Law School, Minneapolis, MN 55455.

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89507.

NPI: National Practice Institute Continuing Legal Education, 861 West Butler Square, 100 North 6th Street, Minneapolis, MN 55403. Phone: 1-800-328-4444 (In MN call (612) 338-1977).

NPLTC: National Public Law Training Center, 2000 P. Street, N.W., Suite 600, Washington, D.C. 20036.

NWU: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611.

NYSBA: New York State Bar Association,One Elk Street, Albany, NY 12207.

NYSTLA New York State Trial Lawyers Association, Inc., 132 Nassau Street, New York, NY 12207.

NYULT: New York University, School of Continuing Education, Continuing Education in Law and Taxation, 11 West 42nd Street, New York, NY 10036.

OLCI: Ohio Legal Center Institute, 33 West 11th Avenue, Columbus, OH 43201.

PATLA: Pennsylvania Trial Lawyers Association, 1405 Locust Street, Philadelphia, PA 19102.

PBI: Pennsylvania Bar Institute, P.O. Box 1027, 104 South Street, Harrisburg, PA 17108.

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700.

SBM: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59601.

SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211.

SLF: The Southwestern Legal Foundation, P.O. Box 707, Richardson, TX 75080.

SNFRAN: University of San Francisco, School of Law, Fulton at Parker Avenues, San Francisco, CA 94117.

TBI: The Bankruptcy Institute, P.O. Box 1601, Grand Central Station, New York, NY 10017.

UDCL: University of Denver College of Law, 200 West 14th Avenue, Denver, CO 80204.

UHCL: University of Houston, College of Law, Central Campus, Houston, TX 77004.

UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124.

UTCLE: Utah State Bar, Continuing Legal Education, 425 East First South, Salt Lake City, UT 84111.

VACLE: Joint Committee of Continuing Legal Education of the Virginia State Bar and The Virginia Bar Association, School of Law, University of Virginia, Charlottesville, VA 22901.

VUSL: Villanova University, School of Law, Villanova, PA 19085.

Current Materials of Interest

1. Regulations

NUMBER	*TITLE*	*CHANGE*	*DATE*
AR 135-100	Appointment of Commissioned and Warrant Officers of the Army	902	2 Mar 81
AR 135-178	Separation of Enlisted Personnel	903	10 Mar 81
AR 135-200	Active Duty for Training and Annual Training of Individual Members	902	25 Mar 81
AR 135-210	Order to Active Duty as Individuals during Peacetime	902	25 Mar 81
AR 210-7	Commercial Solicitation on Army Installations	1	1 Apr 81
AR 230- 1	The Nonappropriated Fund System	901	8 Apr 81
AR 230-9	Nonappropriated Funds: Internal Controls		15 Apr 81
AR 600-33	Line of Duty Investigations	902	31 Mar 81
AR 624-100	Promotions: Promotion of Officers on Active Duty	901	20 Mar 81
AR 635-200	Enlisted Personnel	904	20 Feb 81
AR 635-200	Enlisted Personnel	905	10 Mar 81

2. Professional Writing Award for 1980

Each year, the Alumni Association of The Judge Advocate General's School gives an award to the author of the best article published in the *Military Law Review* during the previous year. The award consists of a written citation signed by The Judge Advocate General and an engraved plaque. The history of and criteria for the award are set forth at 87 Mil. L. Rev. 1 (winter 1980), updated at 90 Mil. L. Rev. 1 (fall 1980).

Gail M. Burgess, Esq., of Philadelphia, Pennsylvania, has been selected to receive the award for 1980. The award is given for her article, "Official Immunity and Civil Liability for Constitutional Torts Committed by Military Commanders after *Butz v. Economou*," published at 89 Mil. L. Rev. 25 (summer 1980). Ms. Burgess was formerly a first lieutenant in the United States Marine Corps.

3. Publications

Schlueter, David A., *Military Recruiter Misconduct: Another View* Volume 86, No. 2 Case & Comment 26 (Mar-Apr 1981). Publisher's address: Case & Comment, P.O. Box 1951, Rochester, N.Y. 14692.

Erratum

The Judge Advocate General Opinion, entitled "Military Installations—Law Enforcement—*Posse Comitatus*" appearing at Item 3, page 25 of the April 1981 issue of *The Army*

Lawyer contains an error. The last 10 lines of the opinion should read as follows:

The transmission of information about a vehicle subject to forfeiture is also allowed when the vehicle has not been (or will not be) seized for any Rule 316 purpose in order that D.E.A. agents may seize the vehicle and institute forfeiture action. Finally, TJAG noted that the seizure of vehicles by CID, MP, and MPI solely for the purpose of forfeiture action (and not for any military investigative purpose) *would* (emphasis added) violate the *Posse Comitatus* Act, 18 U.S.C. § 1385.

By Order of the Secretary of the Army:

E. C. MEYER
General, United States Army
Chief of Staff

Official:
J. C. PENNINGTON
Major General, United States Army
The Adjutant General

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